

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF SAN DIEGO
3

4 Coordination Proceeding)
5 Special Title (Rule 1550(b)),)
6 In re Tobacco Cases II) JCCP No. 4042
7 _____
8 The People of the State of)
9 California, et al. v. Brown &) Pages 1-128
10 Williamson Tobacco Corp., et)
11 al. (SF No. 996781),)
12 And)
13 People of the State of)
14 California, et al., v. Philip)
15 Morris Inc., et al. (LA No.)
16 BC 194217)
17 _____
18
19

20 DEPOSITION OF WESTERN INITIATIVE MEDIA
21 BY: BRUCE G. SILVERMAN
22 TUESDAY, JULY 25, 2000
23 9:53 A.M.
24
25

26 REPORTED BY:
27 JARDENE L. PLATT,
28 RPR, CSR No. 3724

1

1 Deposition of WESTERN INITIATIVE MEDIA BY:
2 BRUCE G. SILVERMAN, taken on behalf of the Defendants
3 at 515 South Figueroa Street, 8th Floor, Los Angeles,
4 California, on TUESDAY, JULY 25, 2000, at 9:53 a.m.,
5 before JARDENE L. PLATT, RPR, CSR No. 3724.
6

7 APPEARANCES OF COUNSEL
8

9 FOR THE PLAINTIFFS:

10
11 THORSNES BARTOLOTTA & MC GUIRE
12 BY: KAREN R. FROSTROM, ESQ.
13 2500 Fifth Avenue
14 Eleventh Floor
15 San Diego, California 92103
16 (619) 236-9363
17

18 FOR DEFENDANT LORILLARD TOBACCO COMPANY:

19
20 ALLEN, MATKINS, LECK, GAMBLE & MALLORY LLP
21 BY: BRADLEY P. KAPLAN, ESQ.
22 HENRY LERNER, ESQ.
23 333 Bush Street
24 Seventeenth Floor
25 San Francisco, California 94104-2806
26 (415) 837-1515
27
28

2

1 APPEARANCES CONTINUED:

2
3 FOR DEFENDANT R. J. REYNOLDS:

4
5 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

6 BY: DONALD F. MILES, ESQ.
7 Three Embarcadero Center
8 Seventh Floor
9 San Francisco, California 94111-4065
10
11 FOR DEFENDANT BROWN & WILLIAMSON TOBACCO COMPANY:
12
13 KIRKLAND & ELLIS
14 BY: SYDNE MICHEL, ESQ.
15 777 South Figueroa Street
16 Los Angeles, California 90017
17 (213) 680-8545
18 -and-
19 SEDGWICK, DETERT, MORAN & ARNOLD
20 BY: STEPHANIE A. SHERIDAN, ESQ.
21 One Embarcadero Center
22 Sixteenth Floor
23 San Francisco, California 94111-3765
24 (415) 781-7900
25
26
27
28

3

1 APPEARANCES CONTINUED:
2
3 FOR DEFENDANT LIGGETT:
4
5 POST KIRBY NOONAN & SWEAT LLP
6 BY: DOROTHY A. JOHNSON, ESQ.
7 600 West Broadway
8 Suite 1100
9 San Diego, California 92101-3302
10 (619) 231-6666
11
12 FOR THE WITNESS:
13
14 RICHMAN, MANN, CHIZEVER, PHILLIPS & DUBOFF
15 BY: JERRY S. PHILLIPS, ESQ.
16 9601 Wilshire Boulevard
17 Penthouse Suite
18 Beverly Hills, California 90210-5270
19 (310) 274-8300
20
21 ALSO PRESENT:
22 GREGORE J. SAMBOR
23
24
25
26
27
28

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1 LOS ANGELES, CALIFORNIA
2 WEDNESDAY, JULY 25, 2000; 9:53 A.M.

3
4 MR. KAPLAN: We just had a conversation off the
5 record where I explained my understanding as to the
6 way that the proceedings are going to work, and let me
7 now put it on the record.

8 Ms. Frostrom and I have had a number of
9 conversations over the course of the last few weeks
10 regarding the scope of this deposition realizing
11 that Mr. Silverman is being deposed today as a
12 percipient witness, but is also a retained expert in
13 the case.

14 The original subpoena which my firm
15 issued in this case to Western Initiative media
16 called for documents related to the preparation of a
17 report titled the ETS warning 12-month fund media
18 plan, which the plaintiffs put in before the court
19 with respect to their motion for preliminary
20 injunction.

21 It was defendants' understanding that
22 Mr. Silverman or Western Initiative Media were the
23 designers of that plan and it was my intent
24 originally to ask Mr. Silverman questions about that
25 today.

26 However, after meeting and conferring
27 with Ms. Frostrom, we determined that the plaintiffs
28 contend that plan is work product and as such they

6

1 do not want questions about that today, but want
2 those questions withheld until Mr. Silverman's
3 expert deposition, which is set for next week.

4 We have negotiated a nature of an
5 agreement regarding permissible questioning on that
6 plan and basically what we have agreed to is that I
7 will be permitted to ask some foundational questions
8 related to Mr. Silverman's retention as an expert in
9 this case, the fact that he did in fact generate the
10 12-month media plan, that it was done utilizing
11 resources from Western Initiative Media and that's
12 the reason why it's on Western Initiative Media's
13 letterhead and the fact that the 12-month media plan
14 is still the operative warning campaign the
15 plaintiffs are putting forward in this case.

16 If the question -- if the answers to
17 those questions indicate that this is still the
18 operative warning campaign in this case, then we
19 will withhold any further questions until the expert
20 deposition related to that media plan.

21 Ms. Frostrom, that is correct?

22 MS. FROSTROM: That is correct.

23 MR. KAPLAN: Now, on a separate but equally
24 important negotiation, Mr. Phillips, who is here as
25 Western Initiative's counsel, and I also reached an
26 agreement regarding the production of documents.
27 Mr. Phillips when he was first reviewing his client's
28 documents focused on those documents related to the

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1 12-month media plan, not realizing Ms. Frostrom and I
2 were in negotiations regarding the scope of the
3 subpoena and testimony today. So the first documents
4 he reviewed were the ones that are not being produced
5 today and were not being produced by agreement between
6 myself and Ms. Frostrom.

7 Once he realized it was the other
8 documents that would be of most interest in
9 Mr. Silverman's deposition today, he called me and
10 indicated that there are literally hundreds of boxes
11 of documents containing the buy orders for the media
12 purchased by Western Initiative related to smoking
13 campaigns, whether that's through Prop 10 or Prop 99
14 or otherwise.

15 He also indicated that there are some
16 summary reports of those hundreds of boxes of buy
17 orders and there are some other miscellaneous
18 documents. He brought with him today those
19 miscellaneous documents, which are being copied
20 right now and will be attached to the depo
21 transcript, and also had faxed over to my office
22 this morning one exemplar of one of the summary
23 reports, which is also being copied and will be
24 attached.

25 We have agreed that the summary reports
26 will be produced in roughly a week's time and
27 defendants will have the opportunity to review
28 those, at which point we will discuss further with

8

1 Mr. Phillips what additional documents we would
2 request be produced out of the hundreds of boxes as
3 supporting information that the defendants would
4 need for purposes of this case.

5 After those documents are produced, we
6 have agreed that Mr. Silverman, if it's necessary,
7 will be reproduced as a percipient witness to answer
8 any questions regarding those later produced
9 documents and the topics that they address.

10 Mr. Phillips, did I get that agreement
11 correct?

12 MR. PHILLIPS: You did.

13 MR. KAPLAN: That being said, are there any
14 other things we need to put on before we start the
15 deposition?

16 MR. MILES: I assume everybody is in agreement
17 with this procedures?

18 MR. KAPLAN: Is anybody not in agreement with
19 them? Hearing no disagreement, can I have the witness
20 sworn, please.

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BRUCE G. SILVERMAN,
having been first duly sworn, was
examined and testified as follows:

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1 EXAMINATION

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BY MR. KAPLAN:

Q. Could you please state your name for the record.

A. Bruce G. Silverman.

Q. Mr. Silverman, have you ever had your deposition taken before?

A. Yes.

Q. On about how many occasions?

A. Four or five.

Q. I am assuming, then, that you are generally familiar with the deposition proceeding, but let me just briefly go through what the ground rules are for a deposition to refresh your recollection.

Do you understand that you have just given an oath to tell the truth?

A. Yes.

Q. Do you understand that's the same oath you would be given if you were in a court of law?

A. Yes.

Q. Do you understand that we have a court reporter here who is taking down all the words that are said in this room?

A. Yes.

Q. Do you understand that at the conclusion of the deposition the court reporter will create a transcript of the testimony in question-answer form

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1 and you will have the opportunity to review that transcript?

A. Yes.

Q. Do you understand that you will also have the opportunity to make any corrections to your testimony?

A. Yes.

Q. Do you know that in the event that you make changes which are substantive, and by that I mean not changing a "the" to an "an" or correcting a spelling, but changing a response from perhaps a "yes" to a "no," if you do that, myself or any other lawyers in the room or any of our clients are permitted to comment about that at the time of trial.

A. Yes.

Q. Do you understand that some witnesses find those types of comments to be personally embarrassing to them?

A. Yes.

Q. For that reason, sir, can I ask you to give us your best testimony today?

A. Yes.

Q. Sir, I may be asking you some questions which you do not know the answer to. Do you understand it is permissible for you to say

26 Mr. Kaplan, I don't know the answer?
27 A. Yes.
28 Q. I would also ask you not to guess during
11
1 the course of your deposition. Will agree with me not
2 to guess?
3 A. Yes.
4 Q. However, sir, I am entitled to your best
5 estimate. Do you know the difference between a guess
6 and an estimate?
7 A. I think so.
8 Q. If I ask you a question which you do not
9 understand, sir, will you tell me that you do not
10 understand the question and ask me to rephrase?
11 A. Yes.
12 Q. You are doing a very good job, but let me
13 remind you, that because there is a court reporter who
14 is taking down the words which are said in the room,
15 we need to refrain from using phrases such as huh-huh
16 and uh-huh. Will you agree to do that?
17 A. Yes.
18 Q. Also, sir, you are doing a very good job
19 of it and we need to refrain from speaking over each
20 other because the court reporter can only take down
21 one person at a time. If we do start speaking over
22 each other, either somebody in the room will let us
23 know or I am certain our court reporter will let us
24 know. Fair enough?
25 A. Yes.
26 Q. During the course of the deposition, there
27 may be objections by one or more of the lawyers in the
28 room. In general, if there is an objection, that's
12
1 being made for the record. You will still be
2 permitted to answer the question.
3 Do you understand?
4 A. Yes.
5 Q. Is there any reason why your deposition
6 cannot go forward today?
7 A. No.
8 Q. Let me first start off with the questions
9 that Ms. Frostrom and I have agreed that I can ask to
10 see how much we can limit the scope of what goes on
11 today.
12 Mr. Silverman, have you been retained as
13 an expert in the Proposition 65 environmental
14 tobacco smoke cases?
15 A. Yes.
16 Q. And it's your understanding you were
17 retained by the plaintiffs as an expert. Correct?
18 A. Correct.
19 Q. During your work as an expert in
20 Proposition 65 environmental tobacco smoke cases, did
21 you generate a report which is titled "The ETS Warning
22 12-month Fund Media Plan"?
23 A. Yes, I did.
24 Q. Sir, if I just refer to that as the
25 12-month plan, will you understand what I am talking
26 about?
27 A. Yes.
28 Q. Did you generate the 12-month plan in your
13
1 capacity as an expert in this case?

2 A. Yes.
3 Q. And did you generate the 12-month plan
4 utilizing the resources of Western Initiative Media?
5 And by that I mean, did you utilize Western
6 Initiative's personnel, their computer system or
7 printers or other information located at Western
8 Initiative's facilities?
9 A. Yes.
10 Q. That's the reason why the 12-month plan
11 has Western Initiative Media's name on it?
12 A. Yes.
13 Q. Is the 12-month plan the warning campaign
14 which you understand the plaintiffs are putting
15 forward in the Proposition 65 ETS case as their
16 suggestion for a plan that should be put in place in
17 the State of California to remedy defendants' conduct?
18 By defendants I mean the tobacco industry.
19 A. Yes.
20 Q. Have you prepared any other plans other
21 than the 12-month funded media plan which you
22 understand is going to be used in connection with this
23 lawsuit?
24 A. No.
25 Q. I understand from discussions with
26 Ms. Frostrom that the 12-month plan which was
27 previously provided to the court and to all parties is
28 going to be updated to change the costs associated
14
1 with the plan to bring it to present value. Is that
2 correct?
3 A. It would have to be.
4 Q. And it's your intent to do that?
5 A. If asked to do so, yes.
6 MR. KAPLAN: With those answers to those
7 questions I am in full agreement to the stipulation we
8 had earlier and I will not ask him questions during
9 the course of the deposition related to the 12-month
10 fund.
11 MS. FROSTROM: Thank you.
12 BY MR. KAPLAN:
13 Q. Mr. Silverman, let me take you through
14 briefly your background, and it's not my intent to go
15 through and into the kind of detail we would go
16 through in the course of your expert witness
17 deposition, but because of the work that you have done
18 in this case, both at Asher & Partners and at Western
19 Initiative, I think your background has some
20 importance so let me briefly take you through it.
21 Can you give me a description of your
22 educational background.
23 A. Yes.
24 Q. And what would that background be?
25 A. I have a Bachelor's degree from Adelphi
26 University in New York City, or actually in New York
27 State. It's not in New York City. And I have a
28 Master's degree from Columbia University. I also
15
1 attended law school at Albany Law School in Albany,
2 New York. It's part of Union University.
3 Q. What was your bachelor's degree in?
4 A. History.
5 Q. And when did you receive that?
6 A. 1966.

7 Q. What is your Master's in?
8 A. It's also in history.
9 Q. And when did you receive your Master's
10 degree?
11 A. 1968.
12 Q. Did you receive a degree from -- is it
13 Albany Law School?
14 A. Yes.
15 Q. Did you receive a degree from Albany Law
16 School?
17 A. No.
18 Q. How many years did you attend Albany Law
19 School?
20 A. Two.
21 Q. Are you admitted to practice law in any
22 state?
23 A. No.
24 Q. I will refrain from getting into a
25 discussion as to why you dropped out of law school,
26 although I am certain there are lots of very good
27 reasons for doing that.
28 Can you give me a brief synopsis of your
16
1 employment background after receiving your Master's
2 degree.
3 A. I began my advertising career at Ogilvy
4 Mather in New York City. At that time it was actually
5 called Ogilvy, Benson & Mather. I started as a
6 messenger. I worked there for 12 and a half years.
7 When I left I was executive vice president and
8 executive creative director of their New York office.
9 I also worked for them in London, Houston and Los
10 Angeles during my 12 and a half years there.
11
12 I joined an agency called Bozell and
13 Jacobs, B-O-Z-E-L-L, in 1981 as executive vice
14 president, executive creative director, general
15 manager of their southwest division. I was based in
16 Dallas, Texas.
17 Three years later I joined BBDO
18 Advertising as head of West Coast operations based in
19 Los Angeles.
20 In 1986 I joined an agency in Los Angeles
21 that at that time was called Asher/Gould Advertising,
22 that A-S-H-E-R, G-O-U-L-D. As -- initially I was
23 executive vice president and shortly after I joined
24 the company I became president, was chief operating
25 officer of the company until 1997.
26 Then I joined what was then called Western
27 International Media as president of their advocacy
28 group. Later I became executive vice president and
17
1 managing director of the Pacific region of the
2 company, of the whole thing.
3 I have been with what was then called
4 Western, is now called Initiative Media North America,
5 now for three years and some months. The same
6 capacity, executive vice president, managing director.
7 The name of the region has changed to the western
8 region.
9 Q. Let me start off with your work at
10 Asher/Gould and later Asher & Partners. When you
11 started off with Asher/Gould in 1986, what were your

12 job duties?
13 A. I was head of the creative department. I
14 was in charge of the business. And I did some account
15 work. And I did some general company management.
16 Q. When is the first time you recall
17 Asher/Gould or one of its later names received a
18 contract related to advertising of tobacco smoke
19 health effects?
20 A. I think 1995.
21 Q. Who was it -- at that time what was the
22 name of the company?
23 A. Asher/Gould Advertising, Inc.
24 Q. In 1995 with whom did Asher/Gould contract
25 regarding tobacco smoke?
26 A. State of California, Department of Health
27 Services, Tobacco Control Section.
28 Q. Do you have an understanding as to whether
18
1 or not the funding for the contract that Asher/Gould
2 had in 1995 came from Proposition 99?
3 A. It did.
4 Q. What were the job duties that Asher and
5 Gould had related to the Prop 99 funded media campaign
6 in 1995?
7 A. Asher/Gould was the primary contractor for
8 the tobacco education media campaign, which meant that
9 they were responsible for advertising to various
10 target audiences in the State of California. And
11 public relations and public outreach efforts for the
12 same program.
13 They subcontracted public relations to a
14 firm called Rogers & Associates for the general
15 market. They subcontracted advertising and public
16 relations for certain multi-cultural audiences in the
17 state to various specialty agencies.
18 Q. Who are the multi-cultural agencies you
19 recall who were subcontractors in the 1995 time
20 period?
21 A. Imada Wong Communications was the
22 subcontractor for Asian advertising and public
23 relations. Carol H. Williams Advertising in Oakland
24 was the subcontractor for African American
25 advertising. Valdes Zacky Communications was the
26 subcontractor for Hispanic advertising and I don't
27 recall who the public relations -- other public
28 relations subcontractors were.
19
1 Q. What work did Asher/Gould do in the 1995
2 time period regarding the funds it received from Prop
3 99 for the smoking campaign?
4 A. Asher/Gould conceived and developed a
5 general market advertising campaign, various
6 television commercials, radio commercials, and outdoor
7 advertising were prepared, researched, produced and
8 Asher prepared media plans which were implemented
9 either by Asher itself or by Western International
10 Media.
11 They also oversaw, particularly from a
12 financial standpoint, the activities of the various
13 subcontractors.
14 Q. During the course of your work at
15 Asher/Gould from 1995 until 1997, did you have the
16 opportunity to see the media plans which Asher

17 prepared for the State of California?
18 A. Yes.
19 Q. During your work --
20 Can I have this document marked next in
21 order.
22 (Deposition Exhibit 4304 was marked
23 for identification.)
24 BY MR. KAPLAN:
25 Q. Mr. Silverman, I have just handed you what
26 has been identified as Exhibit 4304. Can you take a
27 moment and review that document.
28 MR. KAPLAN: Also let me have this exhibit

20

1 marked as 4305.
2 Q. I am actually going to have you review
3 this other one first because I realize I gave them to
4 you out of order.

5 (Deposition Exhibit 4305 was marked
6 for identification.)

7 BY MR. KAPLAN:

8 Q. While you are reviewing 4305, let me just
9 indicate the question I am going to ask so you can
10 think about them while you are reviewing them. The
11 threshold question is going to be, is this a media
12 plan prepared by Asher/Gould Advertising related to
13 the 1995-1996 time period while you were employed
14 there. That's going to be the base question. So if
15 you could review the document and familiarize
16 yourself.

17 Have you had the opportunity to review
18 Exhibit 4305?

19 A. Yes.

20 Q. Is that a media plan prepared by
21 Asher/Gould Advertising?

22 A. It appears to be.

23 Q. And based on your work at Asher/Gould in
24 the 1995-1996 time period, do you believe this to be
25 the operative media plan utilized by Asher/Gould
26 Advertising for the fiscal 1995-96 time period?

27 A. I don't know.

28 Q. What would you need to do to be able to

21

1 determine if this was the operative media plan?

2 A. This is a proposal, so it's a proposed
3 media plan. It has a stamp on it that says draft, so
4 I don't know if this was the final media plan that was
5 actually approved by the client and used.

6 Q. If the plan had been approved by the
7 client for use, would the client have physically
8 signed the media plan?

9 A. Not necessarily.

10 Q. Do you recall occasions where media plans
11 were submitted to the Department of Health Services
12 Tobacco Control Section in draft form which were then
13 signed as approved to use?

14 A. I don't recall.

15 Q. Can you explain to me what the proposed
16 fiscal 1995-96 media plan is and what its purpose was?

17 A. The purpose of this plan is consistent
18 with any media plan. The purpose of a media plan is
19 to identify the target audience that the advertising
20 is intended to reach and to lay out a media strategy,
21 media tactics to most effectively utilize the budget

22 dollars that are available to reach that target
23 audience.

24 MR. KAPLAN: Let me have this document marked
25 as Exhibit 4306.

26 (Deposition Exhibit 4306 was marked
27 for identification.)

28 BY MR. KAPLAN:

22

1 Q. Sir, if you take a look at the exhibit I
2 just handed you, Exhibit 4306, can you tell me whether
3 or not this is a media plan for the 1994 time period?

4 A. It's not a complete media plan. A media
5 plan includes objectives, strategies, documentation,
6 et cetera. It is a series of media flow charts that
7 map out precisely how the media activity be ordered.

8 Q. So Exhibit 4306 is a series of flow charts
9 that indicate what media was to be purchased by
10 Asher/Gould in the 1994 time period?

11 A. Based on the cover page, which says --
12 includes changes to reflect commercials currently
13 airing, it likely -- it likely lays out the
14 advertising schedule as it existed at that time, which
15 would include commercials that have -- or advertising
16 that had already run as well as advertising scheduled
17 to run for the balance of the fiscal year.

18 Q. Based on fact that this document is dated
19 1994, does that change your belief as to when
20 Asher/Gould first received a contract from the State
21 of California Prop 99 funding?

22 A. Yes.

23 Q. Sir, can you take a look at the document
24 in Exhibit 4306 that has the number in the lower
25 right-hand corner A&P2805.

26 Can you review that page and tell me
27 what that is.

28 A. That is a media budget summary that lays

23

1 out to the client the estimated cost of the -- of the
2 advertising campaigns, addressing the general public
3 which is defined as adults, and the radio campaign for
4 the period 19 -- July '94 to June '95, which was the
5 state's fiscal year.

6 Q. Do you see in the lower right-hand corner
7 of that document just above the word "draft" there is
8 a signature?

9 A. Yes.

10 Q. Is that the signature of Colleen Stevens?

11 A. It appears to be.

12 Q. Is Colleen Stevens an employee of the
13 State of California Tobacco Control Section?

14 A. To the best of my knowledge she is.

15 Q. Was she in the 1994 time period?

16 A. Yes.

17 Q. What is the significance to you of
18 Ms. Stevens having signed the page which is Bates
19 numbered A&P2805 on the line designated "client
20 authorization signature"?

21 A. That was indicating the state's approval
22 to proceed with the campaign at the levels indicated
23 on that page.

24 Q. I am going to ask you a broad question
25 because I am going to try to avoid going through all
26 of the documents that I have got with me where

27 Ms. Stevens has signed them. So let me ask you one
28 question and see if I can short circuit a lot of

24

1 questions.

2 Is it your understanding that if
3 Ms. Stevens signed a media budget summary, it
4 indicated the State of California's approval for
5 Asher and Gould to spend the amount of money
6 detailed on the media budget summary during the time
7 period identified on the media budget summary?

8 A. Yes. But advertising is usually
9 cancelable. So it's an authorization to purchase, but
10 not necessarily -- that does not necessarily mean that
11 the advertising ran as originally purchased. It might
12 have been cut back. It might have been canceled for
13 various reasons. So it's an authorization to move
14 forward.

15 Q. What documents would we have to review to
16 determine whether or not the media time was actually
17 purchased and used?

18 A. You would need a post buy analysis.

19 Q. Where would the post buy analysis exist
20 related to Asher/Gould's work on the Prop 99 campaign?

21 A. State of California. Or Asher/Gould.

22 Q. To your knowledge did Asher/Gould create
23 post buy analyses for the Prop 99 campaign in the 1994
24 time period?

25 A. They likely produced post buy analyses for
26 television. They may not have had post buy analyses
27 for radio. And I am using the words post buy analysis
28 very broadly to mean -- to indicate this is what

25

1 really ran as opposed to looking at a post buy
2 analysis from the technical standpoint of how ratings
3 delivery worked, et cetera.

4 Q. Where would we have to look to determine
5 how the ratings delivery worked with respect to the
6 Prop 99 campaign that Asher/Gould was working on?

7 A. Asher/Gould.

8 Q. What document would we wish to look at?

9 A. I have no idea what it would be called.

10 Q. Do you recall Asher/Gould creating a
11 document which detailed how the ratings delivery
12 worked on the Prop 99 campaign?

13 A. I don't recall.

14 Q. Is it you don't recall one way or the
15 other?

16 A. I just don't remember whether or not that
17 was done or not.

18 Q. Do you recall Asher/Gould ever creating a
19 buy analysis in the more narrow scope as you defined
20 it indicating what advertisements really ran during
21 the time period you worked there?

22 A. Yes.

23 Q. During which years do you recall
24 Asher/Gould creating a buy analysis indicating what
25 advertisements actually ran under the Prop 99
26 campaign?

27 A. There were a series of regular reports
28 that were issued to the client by the agency

26

1 indicating media activity for each media form used.

2 MR. KAPLAN: Let me take a break for just one

3 second, please.
4 (Discussion off the record.)
5 BY MR. KAPLAN:
6 Q. Sir, let me turn your attention back to
7 Exhibit 4305, which is the 1995 media plan.
8 A. Yes, sir.
9 Q. What role did you have, if any, in
10 creating Exhibit No. 4305?
11 A. My role would have been peripheral on the
12 media plan. I was -- in addition to being president
13 of the agency at that time I was project director.
14 Therefore, overseeing all aspects of the activity on
15 the account. Therefore, I provided some inputs and I
16 provided review.
17 Looking at this plan, I certainly would
18 have been involved in developing some of the
19 objectives and the media department would have taken
20 it from there.
21 Q. What do you understand the objectives to
22 have been in the 1995 time period related to the
23 dissemination of information regarding tobacco smoke
24 that Asher and Gould was doing pursuant to Prop 99
25 funds?
26 A. I am not understanding your question.
27 Q. Sure. What were the objectives in 1995
28 that Asher and Gould was trying to put forward with
27
1 Prop 99 funds?
2 A. The objective of the overall campaign.
3 Q. Yes.
4 A. The objective of the overall campaign was
5 to reduce the use of tobacco in the State of
6 California. It's -- by definition it's tobacco use
7 prevention campaign.
8 Q. If you review Exhibit 4305, does the
9 document itself indicate what you understand to be the
10 media objectives which Asher and Gould was putting
11 forward to the State of California in the 1995 time
12 period?
13 A. Yes.
14 Q. Do you believe this document accurately
15 reflects the media objectives in the 1995 time period
16 related to the Prop 99 campaign?
17 A. Yes.
18 Q. If you turn to the page which at the
19 bottom has the number A&P5378, and that's contained in
20 Exhibit 4305, you see that's a page that discusses
21 media strategies?
22 A. Yes.
23 Q. Below that are additional pages addressing
24 media strategies?
25 A. Yes.
26 Q. Can you explain to me what this section of
27 the document refers to.
28 A. Media strategies discuss the specific
28
1 types of media that is out-of-home media, television,
2 radio, conceivably direct mail, newspapers, that were
3 to be used in the plan. They provided a rationale --
4 literally the document provides a rationale for the
5 use of that media form and then later there are
6 tactics outlined.
7 Q. Does the portion of Exhibit 4305 which

8 identifies media strategies accurately reflect
9 Asher/Gould's media strategies in the 1995 time period
10 related to the Prop 99 campaign?

11 A. As I stated earlier, this document is a
12 media proposal. So it accurately presents
13 Asher/Gould's proposed strategies. I don't know
14 whether or not all of these strategies were approved
15 by the client or actually implemented.

16 Q. Who would be the person to your knowledge
17 who would know that best?

18 A. It would be somebody at Asher. Asher &
19 Partners.

20 Q. Was there somebody who in your estimation
21 was primarily responsible for the handling of the Prop
22 99 campaign at Asher/Gould/Asher partners?

23 A. Are you speaking about the media portion
24 of the campaign --

25 Q. Yes.

26 A. -- or the overall campaign?

27 Q. The media portion.

28 A. The media director at Asher was at that

29

1 time, was and remains, a woman named Leah Mitchell.

2 Q. Sir, if you could turn to the page in
3 Exhibit 4305 which has the name -- the number A&P5405,
4 can you tell me what that document represents or that
5 page represents.

6 A. The page is headlined "media budget
7 summary by tier." What was done in this plan was the
8 various markets within the State of California,
9 various advertising markets, meaning Los Angeles, San
10 Francisco or San Diego, were put into three tiers.
11 And all of the markets that were put into the first
12 tier, this is a summary of the spending that was
13 proposed for that tier, for the second tier of cities,
14 for the third tier, et cetera.

15 It shows what the base budget was, which
16 was money that we were proposing, or that the agency
17 was proposing to book a contingency which was meant to
18 be held back to look for opportunities later as they
19 may come up. Media is -- the price of media
20 fluctuates and therefore it is wise practice to hold
21 money back to take advantage of opportunities.

22 It then shows the total budget, percentage
23 of budget and a percentage of the 18-plus adult
24 population that this advertising would reach in the
25 state, percentage of adults in the state.

26 Q. Is it your understanding that this page
27 accurately reflects Asher/Gould's proposal to the
28 state regarding the budgetary allocation in the 1995

30

1 time period?

2 A. It appears to be.

3 Q. Sir, let me turn your attention to Exhibit
4 4304, which I handed you a few moments ago.

5 Can you tell me what that document is.

6 A. Yes. This is an analysis of bonus
7 delivery. Part of negotiating for media, it is fairly
8 standard that when you negotiate to purchase media
9 that in addition to the specific units you might be
10 paying for, you might be buying, that you negotiate
11 for free placements, free spots. You can negotiate to
12 encourage the media vendor to utilize their -- a

13 certain percentage of their allocation, public service
14 time, and these are methods of extending the paid part
15 of the campaign. So you get that much more media and
16 therefore that much more reach and frequency on a
17 no-charge basis.

18 Q. So in other words, to give a hypothetical,
19 you may place \$10,000 worth of advertising and that
20 \$10,000 may represent the placement of a hundred ads
21 and you also are able to negotiate an additional 20
22 ads for which you were not charged.

23 A. That's correct.

24 Q. Can you turn to the second page of Exhibit
25 4304 and tell me what that page indicates.

26 A. Is this the page headlined "Introduction"?

27 Q. Yes.

28 A. It is -- it's titled "Introduction." It
31

1 could have also been titled executive summary, in
2 which the agency was reporting a bonus delivery of 57
3 percent above the actual amount spent. And that was
4 valued at -- appears to be valued at \$4.2 million in
5 bonus money.

6 Q. So in other words, if I understand your
7 testimony, in the 1994-1995 time period the State of
8 California in the advertising placed by Asher/Gould
9 received in essence \$4.2 million worth of free
10 advertising based on the bonus delivery for the ads
11 which were purchased.

12 A. That's correct.

13 Q. Am I correct that the remaining pages of
14 Exhibit 4304 explain the breakdown of that bonus
15 delivery?

16 A. Yes. That's what it appears to be.

17 MR. KAPLAN: Can I have this document marked
18 next in order, please.

19 (Deposition Exhibit 4307 was marked
20 for identification.)

21 BY MR. KAPLAN:

22 Q. Sir, I hand you a copy of a document which
23 has just been labeled 4307. Can you take a moment and
24 review that and tell me what this document is.

25 A. There are two documents here, two separate
26 documents. The first document is recommended flow
27 charts for the July-December period. The second
28 document is dated -- and that document is dated

32
1 June 11, 1996. The second document, which is also
2 attached, it begins on A&P3727 dated August 11, 1998
3 are updated 1998 media flow charts.

4 Q. I apologize, I did not intend to give you
5 two documents in one.

6 Let's start with the first document, the
7 document which has Bates number A&P3720 through
8 3724. What does that document represent?

9 A. These are recommended flow charts. Again,
10 flow charts are a visual map of how spending will be
11 flighted out or media will be flighted out, with each
12 page representing different types of media by market,
13 by market tiers. And it outlines literally what
14 months the campaign will be running, literally what
15 weeks the campaign will be running, either -- listed
16 in out-of-home units, literally how many billboards or
17 what the showing would be, which is a media term, what

18 the rating points would be in the case of broadcast,
19 et cetera.

20 MR. KAPLAN: Let me have this one marked next
21 in order, please.

22 (Deposition Exhibit 4308 was marked
23 for identification.)

24 BY MR. KAPLAN:

25 Q. Sir, let me hand you Exhibit 4308 and ask
26 you tell me what this document is. Or what is
27 contained in this document.

28 A. Based on what I am reading on the cover

33

1 sheet and very quickly reviewing the support material
2 behind it, it appears to be the media flow charts for
3 the contract periods beginning in 1993 and continuing
4 through 1997, or at least through part of 1997, by the
5 various advertising agencies that worked on the
6 Department of Health Services campaign.

7 And it also lists the creative rotations,
8 creative rotations specifying which specific
9 commercials or what the topic of those commercials
10 were. Actually, at least what I am seeing here, is
11 they list the titles of various commercials that ran
12 and what the rotations were. Might have been 50
13 percent of the schedule was running commercial A and
14 50 percent was running commercial B, et cetera.

15 Q. Is this the type of document which you
16 would have reviewed in your capacity as president of
17 Asher/Gould prior to its being sent to a client?

18 A. Not necessarily.

19 Q. Do you have a recollection of having seen
20 this document before today?

21 A. I have never seen this document. I wasn't
22 employed at Asher/Gould at the date, at the time it
23 was prepared.

24 Q. As you look through the information
25 contained on the first 20 or so pages of Exhibit 4308,
26 does the information presented there seem accurate
27 based on your recollection of the work Asher and Gould
28 was doing in the 1994 through 1997 time period?

34

1 A. Yes. For the period -- very specifically,
2 my answer is, for the period that I was at
3 Asher/Gould, the information that's on here includes
4 summaries of work that were done by Asher/Gould's
5 predecessors as prime contractor. I have no idea
6 whether that information is correct.

7 Q. However, you do believe that the
8 information is correct for the 1994 through 1997 time
9 period when you were employed by Asher to the best of
10 your knowledge.

11 A. To the best of my knowledge, yes.

12 Q. During your period of employment at
13 Asher/Gould later, Asher & Partners, how many
14 contracts did Asher have with the State of California
15 under Prop 99?

16 A. Two.

17 Q. Do you recall the duration of each?

18 A. The first contract was -- I believe it was
19 two years and the second contract was three years with
20 two one-year options at the state's option for
21 renewal.

22 Q. Did Asher have different duties under the

23 different contracts?
24 A. Substantively?
25 Q. Yes.
26 A. No. They were the same.
27 Q. And what is your understanding as to
28 Asher's duties under the two contracts which it had

35

1 with the State of California?
2 A. As prime contractor for the media
3 campaign, Asher was responsible for developing
4 strategies and tactics to meet the objectives of the
5 tobacco prevention -- tobacco use prevention media
6 campaign. Very specifically for the general market.
7 They also supervised the activities of
8 certain subcontractors who were responsible for
9 developing and implementing similar campaigns directed
10 to multi-cultural target audiences.

11 They were also financially responsible for
12 overseeing the activities of the public relations
13 subcontractor, Rogers & Associates, and its
14 subsubcontractors in the multi-cultural arena.

15 Q. Did Asher play any role in the development
16 of the objectives of the tobacco use prevention
17 program?

18 A. The objectives of the tobacco use
19 prevention program was set by the state as part of the
20 legislation that implemented Prop 99. Asher would
21 have been involved in developing -- in being part of
22 developing advertising objectives, but those are
23 different than -- in essence the marketing objectives
24 which are set by the client, the client being the
25 state.

26 Q. So in this particular instance, the client
27 set the overall goal of the program and Asher helped
28 develop the means to get to that goal. Correct?

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1 A. That's a fair statement.

2 Q. Did you play a role in the development of
3 are those means?

4 A. Yes.

5 Q. What role did you play in the development
6 of the means to fulfill the state's objectives on the
7 Prop 99 campaign?

8 A. As project director on the -- as project
9 director for the prime contractor, part of my
10 responsibilities was to be in essence the chief
11 advertising strategist for the campaign. At the time
12 that Asher received their first contract, that
13 campaign had been running previously, going back to I
14 believe 1990.

15 And my job was to review existing
16 strategies and to advise the state on which of those
17 existing strategies should be continued, which might
18 be better changed, et cetera. I also was responsible
19 for the business relationship that existed between the
20 agency and the client.

21 There was a period where I also functioned
22 as the creative director on the account, which would
23 have been during that 1994 -- probably 1994 time
24 period. '94, '95. Somewhere in there.

25 Q. Am I correct when Asher/Gould received its
26 first contract in roughly 1994 from the state under
27 the tobacco use prevention campaign, you reviewed the

28 activities of the prior prime contractor to determine
37
1 what was good and what wasn't good?
2 A. In our view, yes.
3 Q. And the prior prime contractor was
4 Livingston and Company?
5 A. It was called Livingston Keye, K-E-Y-E, at
6 the time.
7 Q. Were there any elements of the Livingston
8 Keye media program of which you were critical when you
9 took over as prime contractor?
10 A. I don't recall.
11 Q. Were there any portions of the Livingston
12 Keye program which you thought were effective when
13 Asher took over as prime contractor in 1994?
14 A. Are you asking about the media program or
15 are you asking about the overall campaign?
16 Q. Let me start off with the overall campaign
17 and then we will go to media.
18 A. I thought that there were some very
19 powerful elements in the Livingston campaign.
20 Q. Were there any parts of the media program
21 which you thought were effective?
22 A. Certainly thought the use of television
23 was appropriate, radio was appropriate, out-of-home
24 media was appropriate.
25 Q. Did you believe that any of the
26 advertisements which Livingston Keye had provided on
27 TV, radio or out-of-home were effective?
28 A. Yes.

38
1 Q. Are you able to identify any of those for
2 me?
3 A. I really am not sure of the titles of
4 those commercials. There was a commercial I believe
5 was called industry spokespeople, I think. But it was
6 a commercial that appeared to be a group of tobacco
7 executives discussing some of their objectives of
8 recruiting young smokers. I thought it was a very
9 powerful commercial.
10 Q. Was that the commercial with a group of
11 executives sitting around a conference table, all
12 smoking, dark lit commercial, which concluded with a
13 gentleman at the head of the table taking a puff on
14 his cigarette and laughing, we are not in this for our
15 health?
16 A. Yes.
17 Q. Were there any other specific
18 advertisements which you thought were effective when
19 Asher took over as prime contractor on the Prop 99
20 campaign?
21 A. I thought there was -- well -- are you
22 asking --let me ask you a question. Is -- how are you
23 defining the word "effective"?
24 Q. Let me ask you a question. Does
25 Asher/Gould in its business as an advertising agency
26 determine the effectiveness of its campaign?
27 A. You attempt to, yes.
28 Q. When it attempts to determine the

39
1 effectiveness of the campaign, what is it trying to
2 do?
3 A. The effectiveness of the campaign is, is

4 it achieving the objective, is it helping to achieve
5 the marketing objective that was initially set out.
6 In the case of a tobacco use prevention campaign, at
7 the end of the day, effectiveness of the campaign is
8 whether or not you are getting -- you are motivating
9 people to take the behavioral path that you are
10 seeking that it could to take. Not begin smoking, or
11 attempt to quit smoking, et cetera.

12 Q. When you were working at Asher, can you
13 recall any other behavioral paths which the state was
14 attempting to get people to go down other than not
15 beginning smoking and attempting to quit?

16 A. Those are the objectives.

17 Q. Do you ever recall the State of California
18 having as one of its objectives in the Prop 99
19 campaign the reduction in access to tobacco of youth,
20 and by youth I mean somebody under the age of 18?

21 A. Yes, I do. But that's a strategy. If
22 your objective is to reduce the use of tobacco
23 products, one of the strategies you would employ is to
24 reduce access, so you have to be pretty clear on what
25 the distinction is between objectives and strategies
26 when you talk about advertising.

27 Q. Let me see whether or not I can get a
28 complete list of both, then, from you. It's your

40

1 understanding that the two objectives of the tobacco
2 use prevention program were to get people to not begin
3 smoking and to get people to quit smoking. Correct?

4 A. Correct.

5 Q. And to your recollection there were no
6 other objectives. Correct?

7 A. That's my recollection.

8 Q. What were the strategies which Asher was
9 utilizing to meet those objectives while you were
10 employed by Asher?

11 A. The primary strategy was labeled
12 denormalization, which meant that the communications
13 programs, the advertising, the public relations, the
14 public outreach programs, programs in the schools, and
15 it's a pretty complex matrix, if you will, of
16 communication efforts, was designed to take --
17 designed to get the people of this state to view
18 tobacco use as not normal as opposed to the way it had
19 been viewed historically as something that was normal
20 acceptable practice by -- in our society, by people --
21 by young people who wanted to present evidence of
22 themselves as adults.

23 One of the ways you did that was smoking
24 by adults. So demonstrating, finding ways to
25 communicate the tobacco use was not a normal part of
26 our society was a key strategy.

27 Q. Were there any other strategies?

28 A. Youth access was a strategy. Reminding

41

1 the public that sale of tobacco products to minors was
2 illegal. By reminding the public of that it would
3 theoretically make it more difficult for merchants to
4 sell these products, make it more likely that young
5 people would not seek to buy these products.

6 It also demonstrated that vending machines
7 at that time that sold tobacco products were readily
8 available to young people and the -- with the intent

9 of again, heightening awareness of the availability of
10 tobacco products to young people. But again, if you
11 can reduce access to these products or if the overall
12 communications problem could meet the objective of the
13 communications objective of reducing access, use of
14 tobacco products would decline.

15 Q. Were there any other strategies other than
16 denormalization and youth access which you recall
17 Asher/Gould employing while you were there?

18 A. Communication on the dangers of nicotine
19 is a strategy. And the danger of environmental
20 tobacco smoke was a strategy.

21 Q. Were there --

22 A. And a third strategy would have been the
23 communication of the marketing practices of the
24 tobacco industry was a strategy.

25 Q. Can you think of any other strategies
26 which Asher employed while you were there?

27 A. Yes. There was also a strategy in which
28 the state developed a hotline with people could phone

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1 in to get assistance in quitting, if they were
2 interested in doing that.

3 Q. Any other strategy?

4 A. There may have been other strategies by
5 the ethnic subcontractor, the multi-curl
6 subcontractors, that were appropriate for the target
7 audiences they were reaching. I just don't recall
8 what those were.

9 Q. Let's start off with the denormalization
10 strategy. When did denormalization of tobacco use
11 become a strategy at Asher?

12 A. It was inherited from the previous agency.
13 So whenever Asher took over that contract, it was
14 there.

15 Q. Did Asher believe denormalization was a
16 good strategy?

17 A. Yes.

18 Q. What did Asher do to further the
19 denormalization strategy in the media campaign that it
20 put forward as the prime contractor on Prop 99?

21 A. It developed commercials and -- radio and
22 television commercials and that of home medias.
23 Billboards and posters. Principally billboards and
24 posters that underscored the concept that tobacco use
25 was a fairly aberrant practice.

26 Q. Are you able to give me a percentage of
27 Asher's resources under the Prop 99 contract that went
28 to the strategy of denormalization of tobacco use

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1 during the time that you were employed there?

2 A. No.

3 Q. Are you able to rank for me the strategies
4 by way of most important to least important as they
5 were viewed at Asher during the period that you were
6 there related to Prop 99 campaign?

7 A. Denormalization was certainly the first
8 strategy, prime strategy. Promoting the quick line
9 would have been the bottom strategy. Tobacco industry
10 manipulation and the marketing practices of the
11 tobacco industry, which is a substrategy of
12 denormalization. It might have been second. I am
13 guessing. I shouldn't be doing this. I am just

14 guessing.

15 It would vary from year to year because
16 very specific direction would come from the state on
17 whether or not to promote -- whether or not to focus
18 on youth access, not to focus on youth access. When
19 vending machines -- when tobacco vending machines
20 became illegal, that campaign was moderated. Et
21 cetera.

22 Q. Let me turn you next to the strategy
23 related to the dangers of environmental tobacco smoke.

24 Do you understand that if I am referring
25 to ETS it's the same as environmental tobacco smoke?

26 A. I do.

27 Q. What is it that Asher did while you were
28 employed on the strategy of the dangers of ETS?

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1 A. Asher created television commercials,
2 radio commercials, billboards demonstrating the
3 negative effects of secondhand smoke or raising
4 awareness of the dangers of secondhand smoke.

5 Q. Are you able to estimate for me what
6 percentage of Asher's resources under the Prop 99
7 contract were devoted to the strategy of disseminating
8 information relating to the dangers of ETS?

9 A. No.

10 Q. Was it your understanding that at some
11 point the dangers of exposure to ETS became one of the
12 objectives of the State of California under the Prop
13 99 campaign?

14 A. No.

15 Q. Do you have an understanding as to whether
16 or not smoking cessation became one of the objectives
17 of the State of California under the Prop 99 campaign?

18 A. Smoking cessation was always an objective.

19 Q. Do you have an understanding as to whether
20 or not youth access to tobacco products became an
21 objective of the State of California under the Prop 99
22 campaign?

23 A. Of the whole -- of all -- are you
24 speaking -- when you say Prop 99 campaign, are you
25 speaking the Prop 99 advertising campaign or the way
26 the dollars were allocated out for all sorts of
27 programs?

28 Q. Of the advertising campaign during the

45

1 time period you were employed by Asher.

2 A. I would describe it as a strategy as
3 opposed to an objective, but that's our lingo.

4 Q. What specific TV spots do you recall Asher
5 generating related to the dangers of environmental
6 tobacco smoke during the time period you were there?

7 A. There was a commercial called Victim Wife.
8 There was a 10-second commercial, and I don't know the
9 title is, but the copy said, paraphrasing, do you
10 really think secondhand smoke knows to stay in the
11 smoking section?

12 There was a commercial called -- I am
13 having a senior moment -- there is a commercial that
14 featured the presidents and/or chairman of the six
15 largest tobacco companies that reference secondhand
16 smoke and that was intended as a -- partially as a
17 secondhand smoke commercial. Only partially. It was
18 just using it as a support point for raising

19 credibility questions about the industry.
20 There was a commercial -- again, I don't
21 know the title, but it was a series of titles with
22 smoke in front of it that had all of the health
23 organizations that felt that secondhand smoke killed
24 people with one dissenting voice and that was the
25 tobacco industry. I think it's called Who Are You
26 Going to Believe? I think that might have been the
27 title. Commercial titles are odd because they never
28 run. The only people that know them are the people
46
1 that are involved with the ads.
2 I don't recall others.
3 Q. The Victim Wife commercial is the one with
4 the close-up of a gentleman who would appear to be in
5 his late 60s, early 70s, discussing the fact that he
6 didn't know the life that would be lost was that of
7 his wife?
8 A. His wife was his life.
9 Q. Did Asher/Gould work on the series of
10 television campaigns centered around a high school or
11 junior high school bathroom?
12 A. No.
13 Q. Are you familiar with the ads I am talking
14 about?
15 A. You are speaking of the commercials with
16 the fellow with the gas mask?
17 Q. Yes.
18 A. Those were done by the previous agency.
19 Q. Can you think of any other TV spots
20 generated by Asher while you were there related to
21 environmental tobacco smoke?
22 A. I'm sure there were. I don't recall.
23 Q. Are you able to estimate for me the total
24 dollar value spent by Asher while you were there on
25 commercials related to environmental tobacco smoke?
26 A. No.
27 Q. What are the radio spots that you recall
28 Asher generating while you were there relating to the
47
1 dangers of ETS?
2 A. I don't recall.
3 Q. Is it that you don't recall the specifics
4 or you don't believe there were any?
5 A. There may have been. There likely were, I
6 just don't recall the commercials.
7 Q. Are you able to describe for me any of the
8 outdoor media that had an environmental tobacco smoke
9 danger awareness perspective?
10 A. There was -- yes. There were --
11 out-of-home media was used on that subject. I recall
12 a billboard that was similar to the 10-second
13 commercial I described earlier in which the question
14 was raised, do you think secondhand smoke knows to
15 stay in the smoking section? With a subhead that
16 second secondhand smoke kills.
17 There were others, as I recall, that were
18 similarly themed. I don't recall the actual
19 executions.
20 Q. Were those the series of advertisements
21 that were basically rectangular in shape with a
22 colored background and contrasting colored letters?
23 A. Yes. With a --

24 Q. Color board?
25 A. As I recall there was a large picture of a
26 cigarette in it.
27 Q. Those ran on both billboards as well as
28 bus shelters and on sides of buses?

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1 A. Yes.
2 Q. Can you think of any other out-of-home
3 spots?
4 A. Specific to TCS?
5 Q. ETS.
6 A. ETS? No.
7 Q. To your knowledge did Asher ever conduct
8 an evaluation of the effectiveness of its strategy
9 related to the dangers of ETS?
10 A. Asher would have and did research
11 qualitative research in the form of focus groups
12 discussing both strategic issues and creative --
13 proposed creative executions. Asher would not have
14 been responsible for doing the campaign evaluation.
15 The state subcontracts -- or contracts that out to a
16 third party.
17 Q. Who do you understand was the state's
18 subcontractor in the '94 to '97 time period related to
19 assessing the effectiveness of the media campaigns
20 which Asher put together?
21 A. I -- it was connected with Stanford
22 University but I am not exactly sure what -- the name
23 of the organization at Stanford that did it. I do
24 know that the project director's name was Todd Rogers.
25 What time period did you ask?
26 Q. '94 to '97, the time period that you were
27 at Asher.
28 A. They may have changed in the latter part

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1 of that period to -- I believe it's the School of
2 Public Health at University of Southern California. I
3 don't -- I know a change took place somewhere along
4 the line. I can't recall exactly when.
5 Q. When you were employed at Asher, do you
6 ever recall seeing the results of this subcontractor's
7 evaluation of the effectiveness of the program which
8 Asher had put together?
9 A. Yes.
10 Q. Do you recall what that document looked
11 like?
12 A. It was a written report.
13 Q. Do you recall roughly how thick it was?
14 Was this a two- or three-page document?
15 A. No. It was a lengthier report. Actually,
16 what I recall from when I was at Asher is seeing the
17 report, I think I saw a summary of the report in the
18 form of a presentation on slides.
19 Q. Do you have a recollection as to what the
20 conclusions were in the '94 to '97 time period
21 regarding the effectiveness of the media campaign
22 which Asher put together?
23 A. As I recall, the evaluation showed that
24 the results were mediocre, having some areas not doing
25 well.
26 Q. Do you recall which areas the results
27 determined were mediocre or not doing well?
28 A. Prevalence rates, the prevalence rate of

1 teen smoking was -- may have actually been going up
2 slightly and overall prevalence rates or the decline
3 in overall prevalence rates had slowed markedly from
4 previous efforts.

5 Q. Can you think of any other areas which the
6 report felt the campaign was lacking?

7 A. No.

8 Q. Do you recall that there was a criticism
9 of Asher's work on the strategy of the dangers of ETS?

10 A. No.

11 Q. One thing I didn't say at the beginning,
12 if you want to take a break at any time, let me know.

13 Do we want to take a break?

14 MR. PHILLIPS: Maybe we could take a few
15 minutes for the reporter, if no one else.

16 (Recess taken.)

17 BY MR. KAPLAN:

18 Q. Let me see if I can ask you a couple of
19 questions and foreclose huge parts of my outline.

20 During the course of your work at Asher
21 & Partners from roughly 1994 to 1997, did Asher have
22 a contract for the State of California or any other
23 organization related to Prop 10 funds?

24 A. That -- Prop 10 -- no.

25 Q. And the reason for that is Prop 10 wasn't
26 passed until after you left Asher. Correct?

27 A. That's correct.

28 Q. Other than work by Asher for the state

1 pursuant to Prop 99, did Asher do any other
2 advertising campaigns related to cigarette smoking?

3 A. Yes.

4 Q. For whom did Asher have contracts other
5 than with the state pursuant to Prop 99 related to
6 cigarette smoking?

7 A. During the period that I was there?

8 Q. Yes.

9 A. Los Angeles County.

10 Q. Any others?

11 A. Contracts?

12 Q. Yes.

13 A. Not that I recall.

14 Q. Can you briefly describe for me the scope
15 of your contract with Los Angeles County when you were
16 at Asher.

17 A. That contract literally was one in the
18 competitive bidding situation right around the time I
19 was leaving. I just don't recall.

20 Q. Did you play a role in creating the bid
21 proposal?

22 A. Yes.

23 Q. Do you recall whether or not any of the
24 facets of the bid detailed an advertising campaign
25 related to environmental tobacco smoke?

26 A. Environmental tobacco smoke would have
27 been a component of the campaign.

28 Q. During your work at Asher, did you have

1 any responsibility for reviewing the work done by the
2 multi-cultural subcontractors?

3 A. Yes.

4 Q. What was your role in evaluating the work

5 of the multi-cultural subcontracts?
6 A. In reviewing that work, my primary role
7 was to determine what their objective -- advertising
8 objectives were, what strategies they were employing,
9 their rationale for those strategies and then
10 reviewing the creative materials they prepared in
11 support of those campaigns. In certain cases, in the
12 multi-cultural area, you have to simply -- really have
13 to focus on objectives and strategies because the
14 advertising itself may not be in a language that I
15 speak or culturally it may be portrayed in a way that
16 I can't really evaluate because it's subjective.

17 Q. What did you do when you were at Asher to
18 review the work being performed by Imada Wong?

19 A. I just described it.

20 Q. What were the results of your review?
21 What were your conclusions?

22 A. My conclusions were that Imada Wong was
23 doing good work.

24 Q. Did you undertake any effort to evaluate
25 the effectiveness of the work Imada Wong was
26 conducting?

27 A. I would -- if the work Imada Wong was
28 doing was pretested, meaning creative was pretested,

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1 in the form of focus groups or one or more interviews
2 or whatever the methodology may have been, I would
3 have reviewed that. I would have reviewed those
4 results to see whether or not the strategies and
5 creative that was being proposed was appropriate.

6 Q. Do you have a recollection of whether or
7 not any of the Imada Wong advertising was pretested?

8 A. I don't recall.

9 Q. Did you review any of the work being
10 conducted by Carol H. Williams?

11 A. Yes.

12 Q. What were your conclusions regarding the
13 work being done by Carol H. Williams?

14 A. I thought the work was good.

15 Q. Did you conduct any activities to
16 determine the effectiveness of the work being
17 conducted by Carol H. Williams?

18 A. The -- if the work was -- if the work had
19 been reviewed in focus groups or tested in focus
20 groups, I would have reviewed the reports on those
21 focus groups. I can't recall specific, specific
22 research.

23 Q. Do you recall reviewing the work of Valdes
24 Zacky?

25 A. Valdes Zacky. Yes.

26 Q. And what was your opinion of the work
27 Valdes Zacky was doing when you were at Asher?

28 A. I thought it was unsatisfactory.

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1 Q. Why did you believe the work being done by
2 Valdes Zacky was unsatisfactory?

3 A. It was subjective. It was my judgment
4 that the creative that Valdes Zacky had developed was
5 mundane and pedestrian and therefore less likely to
6 cut through the clutter of television. The client,
7 specifically the people who administered the contract
8 at the Department of Health Services, had raised
9 concerns about the performance of Valdes Zacky, which

10 was our subcontractor.

11 Q. Had Valdes Zacky's work been pretested?

12 A. I believe it was.

13 Q. Do you recall the results of the pretest?

14 A. It was -- I don't recall.

15 Q. If Valdes Zacky's work had been pretested
16 and the results of the pretest showed it to not be
17 effective, would you have authorized it to be aired?

18 A. It would not have been authorized to air.
19 It wouldn't have been authorized to be produced.

20 Q. To your knowledge did Valdes Zacky produce
21 spots which did in fact air?

22 A. I believe they did.

23 Q. So with respect to the spots that did air
24 generated by Valdes Zacky, they had been pretested and
25 found to have been an effective spot. Correct?

26 A. There were certainly ranges of
27 effectiveness. When you pretest a commercial or
28 pretest a concept, an advertising concept, it's

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1 pretested in the form of a storyboard or a script or a
2 key visual. It's very different than when you put
3 something on film. And so the commercial that gets
4 made is not necessarily -- you are not going to get
5 the same results that you may get with a tested
6 version. But even in -- you know, we may have said
7 okay, something is runnable, but we might not have
8 felt it was as good as it could be.

9 Q. As a result of your belief that Valdes
10 Zacky was unsatisfactory, what did you do?

11 A. I met with the principals of the agency,
12 Laura Valdes Zacky, and in essence told her that her
13 performance -- the agency's performance was subpar and
14 that if they could not improve their performance, we
15 would have to consider terminating them as a
16 subcontractor.

17 Q. What ultimately happened as a result of
18 those conversations?

19 A. I don't know. I left the -- I left Asher
20 shortly after those conversations. So I don't know
21 what the result of those conversations was.

22 Q. To your knowledge, had anybody done an
23 evaluation of the effectiveness of the Latino media
24 campaign prior to your departure from Asher?

25 A. I don't recall.

26 Q. Do you have a recollection as to whether
27 or not the evaluation performed by the people at
28 Stanford addressed the Latino media campaign?

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1 A. I don't recall.

2 MR. KAPLAN: Let's go off the record for one
3 second.

4 (Discussion off the record.)

5 BY MR. KAPLAN:

6 Q. When you were working at Asher, and you
7 received the Prop 99 campaign, can you describe for me
8 what the creative process was to develop the media
9 which were ultimately disseminated.

10 A. The creative process on that campaign was
11 very similar to the creative process that's used to
12 design any advertising campaign. It begins with
13 learning as much as possible about the subject matter.
14 About -- in this case, about who the target audiences

15 were. Reviewing the competitive activity, in this
16 case the advertising and promotional efforts of the
17 tobacco industry for a pretty lengthy period of time,
18 because you see in that various patterns and try to
19 get an understanding of what their objectives and
20 strategies are.

21 Learn things from the client. You conduct
22 a lot of both primary and secondary research, primary
23 research, principally in the form of focus groups,
24 one-on-one interviews, et cetera, with various target
25 audiences.

26 You then set out what is called a creative
27 work plan. The creative work plan states the
28 objectives and strategies that the creative teams, the

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1 teams of writers and art directors, work together to
2 actually write and develop advertising, work against
3 so they have -- they have a framework for what you
4 assign them. And we ask them to work within fairly
5 narrow criteria so that they are not just shooting off
6 shotgun shells in every direction.

7 In the case of DHS, a lot of creative work
8 was developed by Asher -- initial creative work was
9 developed by Asher actually prior to them receiving
10 the contract. It was done on a speculative basis as
11 part of the presentation effort to win the contract.
12 Some of that work actually survived all the way
13 through actually winning the contract, going through
14 research and then ultimately being produced and
15 running.

16 The majority of the work that was actually
17 produced after the contract had been awarded -- I
18 would say the vast majority of work after the contract
19 had been awarded. You develop many ideas. The ideas
20 are expressed in concept form. That might be a key
21 picture. It might be a storyboard. It might be a
22 billboard layout. This is presented to the client.
23 In this case the Tobacco Control Section people at the
24 Department of Health Services, they review it.

25 You cull that down. You then take some of
26 that work into focus groups with representatives of
27 your target audience, be it adults or kids, boys,
28 girls, different age groups, different ethnicities,

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1 urban, rural, et cetera. You learn what their
2 reactions are to the advertising. You kill some of
3 the work. You adjust some of the work. Sometimes an
4 idea is good except there is just confusion in the way
5 certain words are being expressed, et cetera.

6 You bring it back to the client with the
7 results of the research. Typically the clients -- I
8 shouldn't say typically, frequently the clients attend
9 the focus groups, sit behind the one-way mirrors to
10 witness it. In other cases they watch videotapes. In
11 some cases they simply read reports. But the results
12 of that research or the outcome of that research was
13 used by the creative people to refine various
14 executions.

15 Finally, the executions again were
16 presented to the Tobacco Control Section. There was a
17 further culling by the client in what they wanted to
18 go forward, and then that work was then presented
19 upwards within the Department of Health Services to

20 the Department of Health Services management.
21 Ultimately being reviewed inside the
22 Department of Health Services when I was there by a
23 woman named Kimberly Belshe, who was the head of the
24 department. I think her title is commissioner. I'm
25 not sure. Director. She was director.
26 The work was then -- as I recall, the work
27 was then sent on to the Department of Health and
28 Welfare and in some cases to the governor's office.

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1 Once approved, the advertising was then
2 produced, literally bid out to various production
3 companies, photographer, illustrators, as the case may
4 be, produced.

5 Once again, reviewed by the client. And
6 any editorial changes that needed to be made at the
7 client's request were made.

8 It was then taken once again up to the
9 management of the Department of Health Services for
10 review. It is my belief that some of that work or all
11 of that work was passed on to the Department of Health
12 and Welfare. During the period I was there some of it
13 likely went to the governor's office.

14 Ultimately that work which was approved
15 was then -- was then run, either aired or appeared in
16 the form of billboards or posters, radio spots or what
17 have you.

18 Q. When you were with Asher, what was done to
19 learn about the subject matter regarding environmental
20 tobacco smoke?

21 A. Various people who worked on the campaign
22 in the client -- in the account service group and in
23 the creative department, primarily, and the research
24 folks read voluminously on the subject seeking out as
25 much information as they could find and understanding
26 and digest -- some of it is very, very technical and
27 advertising people are not technical people. They are
28 not scientists. They are not doctors. They are not

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1 physicians. They are not scientific researchers.

2 They read voluminously, met with experts
3 in the field. They were briefed rather exhaustively
4 by the people at the Department of Health Services.
5 They met with representatives of other tobacco control
6 programs that were in effect at the time who may have
7 had some understanding of the subject.

8 Q. What did Asher conclude as a result of its
9 research on the subject matter of environmental
10 tobacco smoke?

11 A. Our initial conclusion when we first took
12 over the account was that secondhand smoke wasn't
13 viewed -- wasn't generally viewed as a health risk as
14 much as it was viewed as a nuisance, as an obnoxious
15 substance, obnoxious smells, et cetera.

16 However, the evidence was clear that it
17 was a health risk. It was clear to us it was a health
18 risk. So the dissemination of information regarding
19 it was a health risk very specifically using the words
20 secondhand smoke kills became a cornerstone of the
21 communications strategy.

22 Over time we were able to find more
23 evidence, more information to help people understand
24 other risks of secondhand smoke in terms of the

25 effects it might have on emphysema, the effects it
26 might have on low birth weight, et cetera. The way
27 good advertising works is you have to keep providing
28 new reasons for people to pay attention to a message.

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1 So over time there was a constant seeking out of the
2 messages.

3 The -- it was also very clear that the
4 tobacco industry took a position that secondhand smoke
5 wasn't dangerous and -- it was -- we sat out to try to
6 counter the disinformation regarding the subject that
7 was being disseminated by the tobacco industry, be it
8 in the form of public relations efforts or testimony
9 in Congressional hearings.

10 Q. When you were with Asher, was there an
11 attempt to design a media campaign --

12 MR. PHILLIPS: Excuse me.

13 MR. KAPLAN: Do you want me to wait?

14 MR. PHILLIPS: No. That's all right.

15 BY MR. KAPLAN:

16 Q. -- was there an attempt to design a media
17 campaign other than secondhand smoke kills related to
18 ETS?

19 A. I don't recall.

20 Q. You don't recall one way or the other?

21 A. No. There was certainly commercials that
22 didn't use the words secondhand smoke kills or ads.
23 It didn't appear in every ad because there were other
24 dangers, as I recall. I wouldn't call that designing
25 a different campaign. It's just different pieces of a
26 jigsaw puzzle that's ultimately intended to have a
27 singular effect.

28 Q. Other than the message that ETS kills, ETS

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1 causes emphysema, ETS causes low birth weight, were
2 there any other health effects of environmental
3 tobacco smoke that you recall Asher looking at and
4 considering putting in a media campaign?

5 A. There were other effects. There were
6 other outcomes. I can't recall the specific ones.

7 Q. Do you recall roughly how many additional
8 outcomes there were?

9 A. No.

10 Q. Was it Asher's intent to put together a
11 media campaign which addressed each of the outcomes
12 their research had concluded could be caused by
13 exposure to environmental tobacco smoke?

14 A. No. That would not have been affordable.
15 If you are meaning that there is a laundry list of ill
16 effects of secondhand smoke, there was never an intent
17 to try to say -- to try to create separate ads about
18 this effect or this result or this outcome and the
19 next outcome, the next outcome, this illness, be it
20 asthma or be it any other effect. That would have not
21 been affordable within the context of the overall
22 campaign.

23 They certainly would have produced or
24 developed many different messages to be considered,
25 but there never would have been an attempt to run more
26 than a few.

27 Q. What was the reason for that?

28 A. The Prop 99 campaign was a very small

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1 budget.
2 Q. Do you recall what your budget was for the
3 Prop 99 campaign?
4 A. The overall campaign, as I recall, during
5 the first three years was around \$12 million, which,
6 you know, in terms -- was then subdivided into the
7 various component pieces with various target
8 audiences. As I recall, I'm not sure that we ever
9 actually spent to the budget, because advertising --
10 because campaigns weren't approved or they were
11 delayed or they were cut back by the state.
12 I think the second -- I think the second
13 contract may have been from more money.
14 Q. That's actually one of the topics which
15 was not on your list for the creative process related
16 to budgetary concerns. At what point in the process
17 does your total budget for the project come into play?
18 A. Well, it's not part of the creative
19 process, but it's part of the advertising process. In
20 this case, you start with a budget. You are given an
21 overall budget.
22 In the case of the tobacco use prevention
23 campaign, as I recall, the state allocated -- or --
24 together with the state, the agency did budget
25 allocations to advertising and to public relations and
26 then within advertising, allocated budget dollars for
27 the various subtarget audiences within the general
28 market and this would have been the same with the

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1 sub -- with the subcontractor programs, budget
2 allocations are done on how much would be allocated to
3 media versus creative, research, agency fees, et
4 cetera.

5 Within those -- that would be rough
6 parameters, which are at least in the initial stages
7 rough parameters, because you have to wait to see how
8 much it's going to cost to make, physically produce
9 the advertising that ultimately gets approved and it's
10 also sometimes difficult to predict what the cost of
11 media will be in advance. But you have to live within
12 an absolute budget.

13 Q. What did Asher do to determine the
14 comparative activity of the tobacco companies when it
15 was designing its media campaign pursuant to Prop 99?

16 A. They reviewed secondary source research on
17 tobacco industry spending, which is widely available
18 from various research companies that measure these
19 things. They reviewed creative examples of tobacco
20 industry creative materials, magazine ads, billboards,
21 promotional materials, point of sale materials.

22 And they went back as far back -- they
23 went as far back as the 19th century in at least
24 reviewing creative materials, et cetera. Because you
25 are dealing with a product that had become an
26 accepted -- or practice that had become an accepted
27 social norm and that takes years to achieve and years
28 to unachieve.

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1 Q. What was the conclusion of Asher's
2 research into the competitive activity of the tobacco
3 companies and their advertising?

4 A. Spent a lot of money. They spent much
5 more money than was being spent to counter their

6 influences. They were very good at what they did.
7 Some of the advertising was out and out brilliant.
8 They had achieved a level of pervasiveness of message
9 that was quite striking.

10 So the conclusion was that the state's
11 program was a significant uphill battle.

12 Q. Was it a battle which in Asher's opinion
13 could be won?

14 A. In Asher's opinion, the objectives of the
15 Prop 99 campaign as stated in the enabling legislation
16 were probably achievable, though not within the time
17 frame outlined in the legislation.

18 Q. What do you understand to be the time
19 frame for the legislation?

20 A. As I recall, as I recall, there was a
21 stated goal of bringing prevalence rates to a certain
22 level, I don't recall the level, before the year 2000.

23 Q. What was Asher's belief as to how long it
24 would have taken the state to bring the prevalence
25 levels to what was identified in the legislation?

26 A. Sometime longer than the year 2000.

27 Q. Are we talking 2002 or are we talking
28 about some period longer?

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1 A. I don't recall.

2 Q. Did anybody from Asher convey to the state
3 disbelief?

4 A. In conversations?

5 Q. Did anybody from Asher say to the state,
6 we have reviewed Prop 99 and we don't believe your
7 goals can be met in the time frame that you have
8 established?

9 A. I think that conversations to that effect
10 may have taken place after a couple of years of
11 experience working on the campaign.

12 Q. Was it Asher's opinion from the inception
13 of its contract that the state's goals could not be
14 met and the time frame established?

15 A. No. At the inception of the contract, we
16 believe that we could meet the goals of the program.

17 Q. At what point did Asher come to the
18 conclusion it would not meet the goals of the program?

19 A. When the program wasn't allowed to run.
20 It wasn't permitted to run.

21 Q. I don't understand your answer. What do
22 you mean by when the program was not permitted to run?

23 A. The campaign was halted for a time because
24 the state wasn't approving copy. Budgets were being
25 cut back. Restrictions were being placed on
26 messaging. Which led Asher to believe that the
27 campaign could not be as effective as it might have
28 been had it run as planned.

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1 Q. Was it Asher's belief that had the
2 campaign been permitted to run, it could have met the
3 goals?

4 A. Yes.

5 Q. What were the restrictions that were
6 placed on the messaging by the state?

7 A. The state was putting a lot of the
8 emphasis on youth access. We felt they were placing
9 an over -- they were overbudgeting for that particular
10 strategy. We felt that -- the state instructed the

11 agency to ease back sharply in the way the
12 advertising -- the way the tobacco industry was
13 portrayed in advertising, the tobacco industry, their
14 marketing tactics were portrayed.

15 The state took some of the more powerful
16 advertising that had tested very, very well and been
17 widely received within the health education community
18 as effective messaging, was taken off the air. The
19 words "the tobacco industry lies" were made verboten.
20 The words "the tobacco industry" for a period of time
21 were made verboten.

22 The actual use of actual dollars allocated
23 to the campaign were way under what the legislation
24 would have permitted it enabled, all of which
25 cumulatively had the effect of significantly weakening
26 the program.

27 Q. Can you describe for me any of the
28 advertisements which the state removed from airing?

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1 A. The commercial that featured the six
2 tobacco executives, I believe it was called Nicotine
3 Sound Bites, as I now recall, I didn't recall it
4 earlier, was definitely taken off the air by the
5 state. That directive came from the Health and
6 Welfare commissioner to Kim Belshe to TCS.

7 There was a commercial called Insurance
8 that was not permitted to run. There was a billboard
9 that was headlined, Are You Choking on Tobacco
10 Industry Lies, was approved, was placed, was put up
11 and that the agency was instructed to have the outdoor
12 companies, the billboard companies remove. And there
13 were other instances that -- I don't remember every
14 one.

15 Q. The first one you talked about, that was
16 the one with the CEO's or presidents of the major
17 tobacco companies giving testimony before Congress
18 indicating that nicotine is not addictive?

19 A. To a House subcommittee, yes.

20 Q. Can you describe for me the insurance spot
21 that you just mentioned.

22 A. Yes. The insurance spot was based on the
23 then fact that a number of leading insurance companies
24 that operated in the State of California were owned by
25 tobacco companies or tobacco conglomerates or
26 conglomerates that also operated in the tobacco field.
27 The idea was that this -- that these companies offered
28 substantial discounts on life insurance or health

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1 insurance to people who don't smoke and yet at that
2 time the tobacco industry was very clear in refusing
3 to acknowledge the health of smoking. And so the
4 conclusion of the commercial is what did these folks
5 know that they are not telling us.

6 Physically the commercial was built around
7 a skyscraper that had a big sign on the top that said
8 "the tobacco industry." It had smokestacks belching
9 out smoke and the camera panned down the side of the
10 building and you saw various executives in the
11 building portrayed, rather unattractively, I thought,
12 and then coming to the bottom where it was an
13 insurance company with a no smoking sign on their
14 door. Pretty good commercial, actually. Of course it
15 all depends on what point of view you take of that.

16 Q. You indicated the creative process -- the
17 final step is the creative work plan.
18 A. No. The first step. Well, the step after
19 research, after gaining an understanding and
20 determining what your strategy is, your creative
21 strategy is, the creative work plan.
22 Q. Would you consider Exhibit 4305 to be one
23 of the creative work plans that Asher used in the Prop
24 99 media program?
25 A. No.
26 Q. Because 4305 is a document that's
27 generated much later in the process?
28 A. The document 4305 is a media plan. Media

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1 plan and creative work plan are two different
2 documents that are directed to two different groups
3 that function within the advertising agency. They
4 relate to each other, but they are two completely
5 separate documents directing different efforts by
6 different specialists.

7 MR. KAPLAN: This is probably a good time to
8 take a lunch break.

9 MR. PHILLIPS: That's fine with me.
10 (Whereupon, a luncheon recess was
11 taken at 12:27 P.M.)
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1 LOS ANGELES, CALIFORNIA
2 TUESDAY, JULY 25, 2000; 1:23 P.M.
3
4 (At this point HENRY LERNER, ESQ.
5 entered the deposition proceedings.)
6

7 EXAMINATION (Continued)
8

9 BY MR. KAPLAN:

10 Q. Mr. Silverman, you had indicated before
11 the lunch break that there were various restrictions
12 put on the messaging by the state, and in particular
13 the state instructed the agency to not run certain
14 advertisements. Do you recall that?

15 A. Yes.

16 Q. Am I correct, sir, that you don't have any
17 firsthand knowledge as to why the state instructed the
18 Department of Health Services to have you discontinue
19 certain advertisements? Correct?

20 A. I only know what I was told by the people

21 who told me.
22 Q. And you were told by people at Department
23 of Health Services. Correct?
24 A. I was told by the people by -- very
25 specifically I was told by Mike Geneste,
26 G-E-N-E-S-T-E, who at that time was deputy director.
27 And --
28 Q. Deputy director of what?

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1 A. Of Department of Health Services. I
2 cannot, sorry, I cannot remember the gentleman's name,
3 but he was the chief health officer of the state at
4 the time. He was a physician. I can't remember his
5 name.

6 But I was very specifically told that they
7 had been instructed by Sandra Smoley, who was the
8 commissioner, the Health and Welfare commissioner
9 representing the Wilson administration, that they did
10 not want this advertising to run.

11 Q. Am I correct that you were not provided
12 with any specifics as to why they didn't want these
13 advertisements to run?

14 A. No, you are not correct.

15 Q. What were you told as to the reason why
16 these advertisements should not run?

17 A. Because both -- the advertising in
18 question was viewed as attacking the tobacco industry.

19 Q. What were you told regarding the reason
20 why that was a motivation to pull the advertisements?

21 A. I wasn't told their motivation for that.

22 Q. So you were merely told that the ads
23 attacked the tobacco industry and they should not run.
24 Correct?

25 A. Correct.

26 Q. And you were not told the reason why the
27 attack on the tobacco industry was a motivating factor
28 in having you pull the advertisements. Correct?

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1 A. Correct.

2 Q. You had indicated that you were displeased
3 with the advertisement being pulled regarding the
4 CEO's testifying before the House subcommittee. Do
5 you recall that?

6 A. If I said it, I believe it.

7 Q. Am I correct that you were not happy the
8 about the fact that the advertisement with CEO's
9 standing before the House subcommittee telling the
10 House subcommittee they did not believe nicotine was
11 addictive was a good idea?

12 A. I'm not sure what the question is. I'm
13 sorry. You have lost me.

14 Q. Let me do the question again. There was
15 an advertisement called CEO where there were CEO's at
16 major tobacco companies giving testimony before a
17 House subcommittee that they did not believe nicotine
18 was addictive. Correct?

19 A. There was such a commercial. It was
20 called Nicotine Sound Bites.

21 Q. You were not pleased when you were told to
22 take the Nicotine Sound Bites commercial off the air.
23 Correct?

24 A. That's correct.

25 Q. Why were you not pleased?

26 A. The commercial had tested extraordinarily
27 well. And it had tested extraordinary well with
28 virtually every audience it was exposed to before it

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1 ran. But when I say audience, I mean both adults and
2 youth. Also, it was a commercial that when it started
3 running, had gotten tremendously favorable reaction
4 from the tobacco community, the health community,
5 health educators, from organizations such as the Heart
6 Association, Lung Association, American Cancer
7 Society, had all been very, very complimentary about
8 that particular ad.

9 The genesis of that commercial initially
10 being taken off the air was that the R. J. Reynolds
11 Tobacco Company either -- I'm sorry, I may not be
12 correct in this, but it was either R. J. Reynolds
13 Tobacco or the president or chairman of R. J.
14 Reynolds, Mr. Johnson, threatened to bring legal
15 action against the state, against the various
16 television commercials (sic) that were running the
17 commercial, against the agency and against myself as
18 an individual claiming defamation.

19 (At this point DONALD F. MILES,
20 ESQ. entered the deposition proceedings.)

21 THE WITNESS: As a result the -- as a result a
22 number of television commercials -- number of
23 television stations refused to run the commercial.
24 The state initially stood behind the commercial and
25 really challenged R. J. Reynolds to kind of call their
26 bluff.

27 The incident received a lot of national
28 attention. Everything from New York Times, Wall

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1 Street Journal, newspapers all over the country
2 reported on this incident of the tobacco industry.
3 At least R. J. Reynolds tried very hard to keep this
4 commercial off the air and so it was put back on the
5 air and then mysteriously dropped from the rotation
6 and -- just dropped from the rotation. And then
7 finally I was explicitly told it would not run.

8 BY MR. KAPLAN:

9 Q. When you say it was mysteriously dropped
10 from the rotation, what do you mean?

11 A. It was one of a number of commercials
12 running at the time. They were being run by the
13 Department of Health Services. First we were
14 instructed just withdraw it and substitute something
15 else. We will put it on again later, which is not
16 atypical. You know, you pull commercials off the air
17 to give them -- give the audience a little time to not
18 get totally bored with it. And that was the original
19 reason that was stated. And then it just never went
20 back on and they refused to run it. Many, many health
21 organizations protested that that commercial wasn't
22 being run. And the state stonewalled on it.

23 Q. You said that the commercial tested
24 extremely well. What do you mean?

25 A. Reaction to it in focus group research,
26 qualitative research. It was very positive.

27 Q. What did you find in the qualitative
28 research of the Nicotine Sound Bites commercial?

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1 A. The specific content of that commercial

2 was you had the heads of the six companies stating
3 that they did not believe nicotine was addictive. The
4 voiceover announcer then said, "Now this same industry
5 wants you to believe that secondhand smoke isn't
6 dangerous." The copy concluded with a line, do they
7 think we are stupid?

8 (At this point SYDNE MICHEL, ESQ
9 entered the deposition proceedings.)

10 THE WITNESS: The reaction of the public was
11 that the tobacco industry as evidenced by these
12 declarations under oath was this was an industry that
13 could not and should not be believed and therefore
14 claims about secondhand smoke, which at that time was
15 viewed more as an obnoxious problem than as a health
16 problem, should be considered.

17 Now, when you talk about focus group
18 research, you are talking about the reactions of 20
19 or 30 people. But that was the consistent reaction.
20 BY MR. KAPLAN:

21 Q. If I am correct, then, the results of your
22 focus group surveys of the Nicotine Sound Bites
23 commercial indicated that people did not believe the
24 CEO's of the major tobacco companies when they stated
25 that nicotine is not an addictive substance. Is that
26 true?

27 A. That is true.

28 Q. Was it also a result of your focus group

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1 surveys that people did not believe the tobacco
2 companies when they said that environmental tobacco
3 smoke is not hazardous to your health?

4 A. No. Can't say that.

5 Q. Was that a question that was posed to the
6 focus group?

7 A. I don't recall.

8 Q. Were there questions posed to the focus
9 group when analyzing the Nicotine Sound Bites
10 commercial regarding the participant's belief as to
11 the general truth of statements made by the tobacco
12 industry?

13 A. Yes.

14 Q. What were the results of those questions?

15 A. There were two results. One was that a
16 number of respondents in the focus groups concludes
17 the tobacco industry couldn't be trusted. The second
18 was almost a visceral anger against the tobacco
19 companies which heightened their awareness of the
20 debate over tobacco and seemingly made them more
21 interested in, in essence, participating in that
22 debate, considering the issues, being involved in
23 them.

24 Q. With respect to the result of visceral
25 anger, did you find that the members of your focus
26 group came down on both sides of the perceived debate
27 or only on one side of the debate? In other words,
28 did any member of your focus group come down with a

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1 visceral reaction saying I agree with the tobacco
2 companies, environmental tobacco smoke is not
3 hazardous to your health?

4 A. As I recall, the discussion was much less
5 on environmental smoke and much more about the general
6 credibility of the tobacco industry.

7 Q. During the course of your focus group
8 analysis for the Nicotine Sound Bites commercial, did
9 you find any member of the group coming down on the
10 side of the debate indicating that the tobacco
11 companies should be trusted in their representations?

12 A. Oh, sure.

13 Q. Are you able to give me a percentage
14 versus the people in your focus group who had a
15 visceral anger position to believe the tobacco
16 industry versus those that had the visceral anger
17 reaction to disbelief of the tobacco industry?

18 A. I can't give you a percentage. It's
19 people behind the one-way mirror from five years ago
20 in my life. I was busy eating M&M's.

21 Q. Is it your recollection, though, that
22 there were people in the focus group who had what you
23 described as a visceral anger that the tobacco
24 industry was telling the truth?

25 A. Telling the truth in general about the
26 consequences of tobacco use?

27 Q. Yes.

28 A. I don't recall people feeling that the

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1 tobacco industry was telling the truth. There were
2 people who didn't like the idea of government spending
3 what they perceived to be general tax dollars on
4 campaigns such as this one. They just didn't like the
5 government doing that sort of advertising.

6 Q. So if I am to understand your testimony
7 correctly, the visceral anger reaction of the focus
8 group members fell into two camps; those who were
9 angry at the tobacco companies for making perceived
10 incorrect statements about the health risks of tobacco
11 smoke and those people who were viscerally angry that
12 the government was spending money on information
13 related to tobacco health risks.

14 A. Yes. We could say that.

15 Q. Let me switch gears on you, sir, and talk
16 to you a little bit about your work at Western
17 Initiative Media. You left Asher to go work for
18 Western. Correct?

19 A. That's correct.

20 Q. Why did you decide to leave Asher to go
21 work for Western?

22 A. There were two principal reasons. The
23 first was I was involved in a long-standing dispute
24 with my partner, Mr. Asher. And the second was that
25 Western Initiative made me an offer that was immensely
26 attractive to join them.

27 Asher/Gould, at that time Asher/Gould, I
28 owned a percentage of the company, but it was a very

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1 small agency. Western International, which was the
2 name of the company that I joined, was a very large
3 company. Asher was privately held. Western is part
4 of a very large public company that is listed on the
5 New York Stock Exchange. Asher's stock is worth
6 whatever we thought it was worth. Interpublic stock
7 is worth what Wall Street says it is. Add it all
8 together, just a better deal. Much more
9 responsibility.

10 Q. What was the nature of your dispute with
11 Mr. Asher?

12 A. It was a financial dispute.
13 Q. Can you give me a brief chronology of the
14 names of your current employer since you were employed
15 by them so I can use the correct name at the right
16 time periods?
17 A. My current employer was from 1960 to 1997,
18 Western International Media Corporation. And 1998 it
19 became Western Initiative Media, which was the result
20 of a merger with Initiative Media. And this year the
21 company formally changed its name to Initiative Media.
22 The holding company is Initiative Media Worldwide. I
23 work for Initiative Media North America.
24 MR. PHILLIPS: There is an Inc. at the end of
25 Worldwide.
26 THE WITNESS: Thank you, Counsel.
27 MR. PHILLIPS: And a comma.
28 BY MR. KAPLAN:

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1 Q. You had indicated that company changed its
2 name in roughly 2000 to Initiative Media and you work
3 for Initiative Media North America?
4 A. That's correct.
5 Q. Are those two different companies?
6 A. You know, I actually am not familiar
7 totally with the corporate structure, but as I
8 understand it, their Initiative Media Worldwide is the
9 global holding company that operates Initiative Media
10 North America and operates Initiative Media
11 International, which is our operations outside the
12 United States and Canada.
13 Q. If I refer to the company as Initiative
14 Media, Western Initiative Media or Western, will you
15 understand we are all talking about the same company,
16 the one that you work for?
17 A. Yes.
18 Q. It makes my life infinitely easier.
19 What does Western Initiative Media do?
20 A. We are a media agency. A media agency
21 plans and manages media communications programs,
22 meaning that we plan media campaigns, and by planning
23 them we do both strategic and tactical planning,
24 helping advertisers how to determine allocate their
25 advertising budgets to various forms of media,
26 television, radio, newspaper, magazines, out-of-home,
27 Internet, et cetera.

28 And then it implements these campaigns by
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1 negotiating time and space and managing that time and
2 space as it runs to assure that the vendors comply
3 with the orders that they have been given.

4 We are also responsible for evaluating the
5 performance of the media buys in terms of rating
6 delivery, et cetera. And confirming that advertising
7 ran in a timely manner. Confirming that it ran
8 specifically as ordered and paying the bills to the
9 vendors of that media. That's what we do in general.

10 Q. What have your job titles been with
11 Western Initiative since joining the company?

12 A. My initial title was president of Western
13 International Advocacy Group. Then my title was
14 changed to executive vice president, managing director
15 of International Advocacy Group. All of the various
16 divisions of the company had presidents and we did

17 away with that. It was silly, it seemed, to have
18 something like 35 presidents floating around.

19 And then my job was changed. I became
20 executive vice president, managing director of the
21 Pacific region of the company and now I am executive
22 vice president, managing director of southwest
23 operations, I think. But my business card says
24 executive vice president, managing director.

25 Q. Have your job duties changed at Initiative
26 Media since the time when you joined the company?

27 A. Yes.

28 Q. Were your job duties generally broken up
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1 into two categories, those when you were the president
2 or executive vice president and then those which you
3 held when you became the executive vice president,
4 managing director?

5 A. Yeah. There was the Advocacy -- the work
6 I did with the advocacy Group and then since then.

7 Q. What were your responsibilities when you
8 worked for the Advocacy Group?

9 A. The Advocacy Group specialized in working
10 on cost-related marketing campaigns. I should say in
11 theory. In theory I would focus on cause-related
12 marketing campaigns and political campaigns. And
13 government advertising efforts, which are different
14 than the private sector because of the way we are
15 administered and the way you secure the accounts.

16 My responsibilities as managing director
17 of the Pacific region, and then more recently the
18 southwest division or region, was responsible for all
19 of the activities of the company on all accounts for
20 the offices in the Western part of the United States,
21 Los Angeles, San Francisco, San Diego, Portland,
22 Denver, Salt Lake City, Phoenix and Las Vegas.

23 Q. During the course of your work in the
24 Advocacy Group, did you have contact with media
25 campaigns related to environmental tobacco smoke?

26 A. Very slightly.

27 Q. During the course of your work as the
28 managing director of either the Pacific or southwest
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1 region, do you have contact with advertising campaigns
2 related to environmental tobacco smoke?

3 A. Slightly.

4 Q. What are the accounts that Initiative
5 Media has had since the time that you joined them
6 where all or part of the campaign relates to
7 environmental tobacco smoke?

8 A. The California Department of Health
9 Services tobacco use prevention campaign, the one
10 that's funded by Prop 99 in which we acted as a vendor
11 to Asher/Gould, and more recently Asher & Partners.

12 We worked for the Oregon -- we again
13 worked through Asher for the Oregon Department of
14 Health Services on the tobacco use prevention
15 campaign. We worked for the Prop 10 campaign, which
16 was in essence a ballot measure campaign, worked on
17 that campaign doing media buying.

18 And we are working on the California
19 Children's -- California Children and Families
20 Commission campaign, which as I understand it is
21 funded by the dollars that came out of the Prop 10

22 initiative.
23 In all of these cases we function as a
24 buying agent only. We don't do the planning. We
25 don't do the strategic planning or tactical planning.
26 We simply -- in essence, we buy time, which is
27 commodity buying.

28 The only other area of our involvement has
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1 been to be involved in pitching or attempting to
2 secure other tobacco use prevention campaign contracts
3 for the American Legacy Foundation, State of Florida.
4 We were unsuccessful. We are members of -- we were
5 part of teams that went after those accounts.

6 Q. You gave me a lot of information. Let me
7 go back through some of it.

8 Initiative Media placed a bid with the
9 American Legacy Foundation?

10 A. No. We were a member of a team.

11 Q. And the team of which Initiative Media was
12 a member was not successful in getting a contract with
13 American Legacy. Correct?

14 A. That's correct.

15 Q. Initiative was a member of a team that
16 tried to get some funding from the State of Florida on
17 anti-tobacco issues?

18 A. Correct.

19 Q. That team was not successful?

20 A. Correct.

21 Q. The work that Initiative Media did
22 regarding the Prop 10 campaign as distinguished from
23 the California Children and Families Commission work
24 related to the passage of Prop 10?

25 A. That's correct.

26 Q. You indicated that Initiative Media
27 functioned as a buying agent only and did not work on
28 the strategic or tactical planning. Correct?

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1 A. That's correct.

2 Q. When you say that Initiative Media did not
3 work on the strategic or tactical planning of any
4 environmental tobacco smoke campaign, do you mean that
5 Initiative Media did not create any advertisements?

6 A. That's correct.

7 Q. And you also mean that Initiative Media
8 was not involved in the decision as to what markets
9 these advertisements should be placed?

10 A. That's correct.

11 Q. Am I correct that the only work Initiative
12 Media did regarding the environmental tobacco smoke
13 campaigns was to purchase time on various television
14 and radio stations and purchase space on various
15 out-of-home locations for advertisements generated by
16 others?

17 A. I don't believe -- I do not believe that
18 we ever actually bought out-of-home for any of these
19 campaigns. They were purchased by other agents.

20 As far as broadcast time, all we did was
21 negotiate and buy time. We -- we are not in the
22 business of creating advertising at all. But we did
23 none of the planning. We didn't determine the
24 markets. We didn't determine anything other than we
25 are told buy X amount of rating points or X amount of
26 spots. Here are the markets. Here are the

27 parameters. We take that direction in the case of
28 these campaigns from the advertising agencies that are

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1 involved.

2 Q. You had indicated on the Prop 99 campaign
3 you are a subcontractor to Asher?

4 A. Not a subcontractor. We are a vendor.

5 Q. On the Oregon Department of Health
6 Services, you function exclusively as a vendor to
7 Asher?

8 A. Yes. We -- well, we operate under Asher's
9 direction.

10 Q. When you were working on the Prop 10
11 campaign, under whose direction was Initiative Media
12 working?

13 A. The ballot measure?

14 Q. Yes.

15 A. I'm sorry, I don't recall the name of the
16 firm that was a political consultancy that was
17 managing the campaign. We did that pro bono, by the
18 way.

19 Q. Which side of the ballot measure was
20 Initiative Media working on for the Prop 10 campaign?

21 A. We were on the side trying to help get it
22 passed.

23 Q. To your knowledge did Asher ever work as
24 an agency for any of the tobacco companies?

25 A. To my knowledge, no.

26 Q. To your knowledge did any of the
27 advertising agencies by whom you have been employed
28 work for the tobacco industry?

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1 A. Any of them?

2 Q. Yes.

3 A. Ogilvie & Mather worked for R. J. Reynolds
4 in the U.S. for a period while I was working there. I
5 know that they work for Philip Morris, at least in the
6 foods divisions in Philip Morris now. I don't know
7 whether or not they are involved in tobacco. I don't
8 recall if Bozell was involved in the tobacco business.
9 The parts of Bozell I managed weren't. And I don't
10 recall BBDO's involvement, the parts I was involved
11 with were.

12 Q. Did you work on any of the tobacco
13 campaigns at Ogilvie & Mather?

14 A. No.

15 Q. Did you have any contact with any of the
16 work Ogilvie & Mather was performing for any of the
17 tobacco companies when you were there?

18 A. The only contact I had was I was on the
19 board and the board would review all the work that was
20 being done by the agency periodically, so I saw it.
21 But I wasn't -- it wasn't in my group. It wasn't in
22 my area of responsibility.

23 Q. What group had responsibilities at Ogilvie
24 & Mather for the tobacco advertising?

25 A. There were two executive creative
26 directors at that time that basically were responsible
27 for the output of the New York office, so it was in
28 the other group. My group was food and airlines and

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1 travel and stocks and bonds.

2 Q. What else was covered in the other group?

3 A. More food. Cigars. Diamonds. Cars.
4 Beer.
5 Q. Was Ogilvie & Mather broken up by account
6 as opposed to types of products?
7 A. Agencies are broken up by accounts and
8 accounts are basically product focused. You wouldn't
9 have a group, for example, in those days Kraft, or at
10 least the part of Kraft I worked on was called General
11 Foods, you wouldn't have had a group with all the
12 General Foods accounts. What it would have been, you
13 would have a group that might have had Maxwell House
14 and another group that might have had Jell-O. It's
15 product focused.
16 I'm sorry, can you ask me -- can I ask a
17 question? Did you ask me if I had ever worked on
18 tobacco or cigarettes?
19 Q. I don't remember. Does your answer change
20 depending on how the question would be worded?
21 A. Yup.
22 Q. Let me ask you the series of questions
23 again because I don't remember. Have you ever worked
24 on any cigarette advertising campaigns?
25 A. No.
26 Q. Have you ever worked on any tobacco
27 advertising campaigns?
28 A. Yes.

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1 Q. By whom were you employed when you worked
2 on a tobacco advertising campaign?
3 A. Ogilvie & Mather.
4 Q. What tobacco advertising campaign did you
5 work on when employed by Ogilvie & Mather?
6 A. I worked on a cigar campaign for a product
7 called Tijuana Smalls in the early 1970s.
8 Q. By whom do you understand Tijuana Smalls
9 to be manufactured?
10 A. General Cigar Corporation.
11 Q. What work did you do on the Tijuana Smalls
12 media campaign?
13 MS. FROSTROM: Objection. We are straying a
14 little bit far from Mr. Silverman as a PMK.
15 MR. KAPLAN: I think it goes to his background
16 and knowledge for anti-tobacco advertising if he did
17 pro tobacco advertising.
18 MS. FROSTROM: How is his background relevant
19 when he's here speaking for Initiative Media?
20 MR. KAPLAN: Well, because I think the
21 knowledge that he has gathered as a result of --
22 clearly any recommendations he has regarding the
23 purchasing or designing of media campaigns would be
24 influenced if he has done work either against the
25 tobacco industry or for the tobacco industry. I think
26 that's going to form part of the basis for the nature
27 of his work at Western Initiative as well as at Asher.
28 We have spent a good -- most of the day so far talking

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1 about Asher. But I think it forms a foundation for
2 much of what he --
3 MS. FROSTROM: I can see some foundation would
4 be relevant. I am giving you a little bit of latitude
5 but I think we are straying in the wrong direction. I
6 would rather not go much farther.
7 MR. KAPLAN: I will see if I can keep it

8 limited.
9 Q. What were your activities on the Tijuana
10 Smalls cigar campaign?
11 A. I would say beginning copy writer and I
12 wrote some trade ads.
13 Q. What do you mean when you say you wrote
14 trade ads?
15 A. Trade ads are sort of the -- it's the work
16 that entry level people do in advertising. It's
17 advertising that appears in trade journals,
18 business-to-business advertising.
19 Q. What year was this?
20 A. Late 60s, early 70s.
21 Q. When you say that you were writing the
22 trade ads, were you creating them?
23 (At this point HENRY LERNER, ESQ.
24 left the deposition proceedings.)
25 THE WITNESS: Yes.
26 BY MR. KAPLAN:
27 Q. And these were the ads that ultimately got
28 placed into trade journals?

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1 A. I think they got placed.
2 Q. And the purpose of these ads was to sell
3 cigars?
4 A. The purpose of these ads was to -- like
5 ancient history, but as I recall, the purpose of the
6 ads would have been to try to persuade either
7 wholesalers or retailers or tobacco products to stock
8 this product.
9 Q. Did any of the ads that you created on the
10 Tijuana Smalls campaign contain any information
11 regarding environmental tobacco smoke?
12 A. No.
13 Q. Did the advertisements that you created on
14 the Tijuana Smalls campaign when employed by Ogilvie &
15 Mather contain any health information regarding
16 cigars?
17 A. No.
18 Q. Do you remember what the advertisements
19 were like that you created for the Tijuana Smalls
20 campaign?
21 A. It was about three months is all I
22 probably worked on it. I mean, I wanted to give a
23 very accurate answer to your question.
24 Q. I appreciate that. Do you remember what
25 any of the campaigns looked like?
26 A. I remember what the big campaigns were
27 like. I don't remember what the stuff I worked on was
28 like. Stuff I was working on was just little stupid

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1 trade ad. I am sorry, I shouldn't say it like that.
2 But it's the kind of work that brand-new lawyers get
3 to do. It's the advertising equivalent. I remember
4 the big campaigns, but I didn't do them. I just
5 admired them.
6 Q. Let's talk about the work which you did on
7 the Prop 99 campaign as a vendor to Asher/Gould.
8 A. Okay.
9 Q. With whom were you coordinating at Asher
10 on that project?
11 A. Are you asking who Initiative Media
12 coordinates with or me?

13 Q. Let me back up. I can go even more basic
14 than that. How many contracts did Initiative Media
15 have with Asher under the Prop 99 campaign?
16 A. We had no contracts.
17 Q. How is it that Initiative Media gets
18 business from Asher from Prop 99 funded
19 advertisements?
20 A. We function as a vendor.
21 Q. For what period of time has Initiative
22 Media been functioning as a vendor to Asher related to
23 the Prop 99 campaign?
24 A. Since Asher got the contract, if that was
25 1994, it's been since that time.
26 Q. To your knowledge has Asher ever used an
27 organization other than Initiative Media to purchase
28 time for the Prop 99 campaign?

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1 A. They bought time themselves. They have a
2 media department, so they bought time themselves. To
3 the best of my knowledge they didn't use any other
4 outside vendors other than Initiative Media.
5 Q. Does Initiative Media purchase time in all
6 markets for Asher or only limited markets?
7 A. Are you asking for -- in tobacco control
8 efforts?
9 Q. On Prop 99 campaign.
10 A. I don't know.
11 Q. Has Initiative Media purchased time for
12 Asher on the Prop 99 campaign in any ethnic markets?
13 A. Yes. Excuse me. To be accurate,
14 Initiative Media also worked for Carol H. Williams
15 separately, so we -- the company purchased ethnic
16 media, or at least African American media, worked as a
17 vendor for Carol H. Williams Advertising which was
18 working under the direction of Asher. Though Asher
19 didn't instruct Carol H. Williams to use Initiative
20 Media, that just was two separate situations.
21 Q. Other than performing work for Asher and
22 Carol H. Williams, did media perform work for anybody
23 else with Prop 99 funds?
24 A. I don't believe so.
25 Q. During what period of time was Initiative
26 Media a vendor to Carol H. Williams?
27 A. I don't know when the relationship with
28 Carol H. Williams began. It preceded my joining

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1 Initiative Media and I believe it preceded Asher's
2 involvement with tobacco control. And the
3 relationship has continued, though not on tobacco
4 control. We worked for Carol H. Williams on other
5 accounts, but not on -- at least not recently for
6 tobacco.
7 Q. When do you understand Initiative Media
8 received its last assignment from Carol H. Williams on
9 tobacco control issues?
10 A. I can guess, two years ago maybe, three
11 years ago.
12 Q. Do you have an understanding as to why
13 Initiative Media has not received a request to buy air
14 time from Carol H. Williams for roughly the last two
15 years?
16 A. The amount of time they were buying, the
17 amount of time they would have wanted us to buy and

18 the kind of time they wanted us to buy, they could
19 possibly buy as efficiently themselves and therefore
20 not have to pay us.

21 Q. Is it your understanding that's the reason
22 why Carol H. Williams has not sent you an assignment
23 to purchase time for the last two years?

24 A. I believe as related to tobacco control, I
25 believe that to be reason.

26 Q. Has that been conveyed to you by anybody
27 at Carol H. Williams?

28 A. Yes.

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1 Q. Who told you that from Carol H. Williams?

2 A. Carol H. Williams.

3 Q. Does Initiative Media utilize any
4 subcontractors for the purchase of time for the Prop
5 99 campaigns?

6 A. Subcontractor -- no.

7 Q. Let's talk about your work and the
8 coordination between Asher and Initiative Media on the
9 Prop 99 campaign. What is the process whereby
10 Initiative Media communicates with Asher to get
11 instructions on media buys?

12 A. The process begins with Asher. Asher is
13 responsible for preparing a media plan which includes
14 the tactical plan that is embodied by flow charts as
15 you have seen them in the various exhibits you have
16 asked me to look at earlier.

17 Once that plan is approved -- that plan
18 includes information that is provided by Initiative
19 Media regarding the cost -- the anticipated cost of
20 media downstream. If you are planning to buy now the
21 month of July, if you are planning to buy media in
22 August, September, October, November, December, the
23 price of media will vary by market, by month, by day
24 part, depending upon supply and demand issues. The
25 nature of our business is such is that we have a
26 fairly good read on what the anticipated cost of that
27 media will be, which enables Asher to estimate
28 appropriately to lay out the schedule, to lay out the

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1 campaign.

2 They then create a series of buying
3 parameters. Buying parameters will say we want you to
4 buy these markets. We want you to buy this amount in
5 radio, this amount in television. Here are the --
6 they give us the media targets. Media targets usually
7 are demographic. Women 18-24, for example. Household
8 income 40,000, college education or more. Standard
9 demographic information.

10 They give us information as to the day
11 part mix they want us following, meaning how much
12 advertising do you want prime time, daytime, late
13 night, overnight. They give us parameters involving
14 must buys, certain programming that they absolutely
15 want us to buy, with certain programming they
16 absolutely do not want us to buy for whatever reason.

17 There are some other technical factors
18 that enter into this. You can't -- it could be that
19 they don't want to us buy any television program that
20 has a rating less than, pick a number. Radio ratings
21 less than, pick a number. And we then go into the
22 market and place the buy. And the buy is placed.

23 Asher communicates -- a media person at
24 Asher, and it might be a media director, associate
25 director, buying supervisor, I don't really any who
26 does that anymore, communicates with a client service
27 person at Initiative Media. Client service person is
28 like an account executive in an advertising agency in

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1 this case.

2 They in turn take the specs that have been
3 given by the agency. They enter it into an electronic
4 job order, which really is just taking those specs and
5 putting it into electronic language that we can
6 disseminate. It goes into our buying -- our local
7 broadcast group in this case because that's all we buy
8 them. The local broadcast group, goes to a buying
9 supervisor.

10 The buying supervisor says here are
11 markets we are required to buy and now I will parcel
12 that out to the broadcast negotiators, the buyers that
13 are based in various offices that we have in the State
14 of California where there are supervisors.

15 The supervisors in those offices in turn
16 give the buying assignment to buyers in those offices
17 who are responsible for buying radio or television.
18 If the office buys more than one market, it might be
19 multiple buyers involved. And they would be going in
20 to the market to place the buy.

21 The buy in essence is then assembled on
22 paper. So we are able to say we are able to buy X
23 amount of rating points for X amount of dollars. We
24 were able to meet the specifications that you have
25 given us to this degree. As part of that process, the
26 buyers would be negotiating for bonus wait free spots
27 that we have spoken about earlier.

28 And a schedule is assembled which is given

99

1 to Asher to review. With Asher's approval of the
2 schedule, the buy then goes forward. The buy has
3 actually been placed, but is subject to cancellation
4 if the agency and/or the client for some reason has a
5 problem with it, because we do all of this at least
6 four weeks in advance of the actual time running -- of
7 the advertising running.

8 During the period that the advertising is
9 running, it is the buyer's responsibility to make sure
10 that the advertising is actually running as ordered.
11 You do that by contacting the stations. Working with
12 the reps at the stations to make sure it really runs.
13 Advertising will be preempted because of news events,
14 because of weather conditions, because programming
15 runs long, because the station screws up. And it's
16 very important that you get what you pay for. If you
17 don't get what you pay for, you either get a credit or
18 a make good. That's part of the process.

19 Ultimately the -- we prepare a bill based
20 on what has been ordered. We submit that bill to the
21 agency. The agency ultimately submits it to their
22 client. They are paid by the client. Then they in
23 turn pay us based on actual performance, in which we
24 document that the advertising did indeed run.

25 But it's literally units. It's literally
26 ratings. What the content of the advertising is
27 that's running in any one of those units, we don't

28 know because we don't do that. We don't provide those
100
1 instructions to the stations. That's provided by the
2 advertising agency.
3 Q. The process which you have just described,
4 is that the same one utilized for Initiative Media's
5 work on the Oregon Department of Health Services
6 tobacco use prevention program?
7 A. I believe that to be true.
8 Q. The process which you have just described,
9 is that the same process which is followed by
10 Initiative Media on the California Children and
11 Families Commission program?
12 A. Yes. That is correct.
13 Q. Who is it who provides the information to
14 you on the California Children and Families Commission
15 program?
16 A. "You" meaning Initiative Media.
17 Q. Yes.
18 A. Asher & Partners. Although I guess they
19 changed their name yesterday.
20 Q. To?
21 A. Asher Gal, G-A-L.
22 Q. Other than the work which Asher previously
23 performed for Carol H. Williams and the work which it
24 performed pro bono on the Prop 10 campaign, has all of
25 Initiative Media's other work related to tobacco come
26 as a result of its relationship as a vendor with
27 Asher?
28 MR. PHILLIPS: For purposes of the record, will
101
1 you restate that question? I think you flipped words.
2 You called it Initiative/Asher.
3 MR. KAPLAN: Let me give you the question
4 again.
5 Q. Other than the work that Initiative Media
6 did for Carol H. Williams and other than the work that
7 Initiative Media did pro bono on the Prop 10 campaign,
8 has Initiative Media's work related to tobacco smoke
9 come exclusively as a result of its relationship as a
10 vendor to Asher?
11 A. No.
12 Q. What other work has Initiative Media done
13 on tobacco smoke issues?
14 A. As previously stated Initiative was part
15 of various teams that solicited American Legacy
16 Foundation advertising campaign, an anti-smoking
17 campaign that is being mounted in Minnesota and an
18 advertising campaign that is being mounted in Florida,
19 and there may have been some others where we provided
20 advice and counsel to the advertising agencies that
21 were the contenders for the accounts.
22 In every case we would have been a
23 resource to them and ultimately a media buying vendor
24 to them, or perhaps a subcontractor, depending on what
25 the business arrangement was between the parties.
26 Q. Has Initiative Media placed any buys which
27 were funded through American Legacy?
28 A. No.
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1 Q. Has Initiative Media placed any buys which
2 were funded through monies coming from the State of
3 Florida?

4 A. I believe not.
5 Q. Has Initiative Media placed any buys with
6 monies coming from the State of Minnesota?
7 A. I believe not.
8 Q. Maybe I misunderstood your answer or you
9 misunderstood my question. Other than the work which
10 Initiative Media did for Carol H. Williams and the pro
11 bono work it did on the Prop 10 campaign, has
12 Initiative Media done any work placing any ads as a
13 result of any relationship other than its relationship
14 with Asher?
15 A. Are you asking if we have placed
16 advertising?
17 Q. Yes.
18 MR. PHILLIPS: You define work this time but
19 you didn't define --
20 MR. KAPLAN: I apologize. My question was not
21 clear.
22 Q. Let me give it to you again. Let me back
23 up. Other than buying time and placing
24 advertisements, does Initiative Media do work for its
25 clients?
26 A. Yes.
27 Q. And that work relates to pricing various
28 media buys to put into proposals?

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1 A. When we work on behalf of advertising
2 agencies such as Asher, we provide Asher with
3 marketplace information to help them create media
4 plans and then working under their direction we
5 implement media buys. For other clients we function
6 as both a strategic and implement resources, in
7 essence performing the functions that an advertising
8 agency media department might, might play in the
9 strategic area. So it varies by client. That's the
10 broad definition.

11 To answer your question as I understand
12 it, in the tobacco area we provide marketplace
13 information to Asher to help them develop plans and
14 then we implement plans or at least broadcast plans
15 on their behalf, meaning we buy.

16 We have provided strategic advice and
17 counsel to what have turned out to be unsuccessful
18 bidders for anti-smoking campaigns. Initiative
19 Media acted as a resource to me in my capacity as an
20 expert witness in helping develop a media plan for
21 this Prop 65 situation for which they were paid.

22 Q. Other than the work which Western
23 Initiative did on the Prop 99 campaign, on the Oregon
24 tobacco use prevention campaign, on the Prop 10 pro
25 bono campaign, on the California Children and Families
26 Commission campaign, on the preparation of pitches to
27 the American Legacy Foundation, Florida, Minnesota,
28 and the work which Initiative Media did in the

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1 preparation of the media campaign for the Prop 65
2 lawsuit, has Initiative Media performed work on any
3 other tobacco-related program?

4 A. Yes.

5 Q. What other programs has Initiative
6 Media --

7 A. Initiative Media has served as a paid
8 consultant to the Attorney General's office of the

9 State of California, providing -- primarily in the
10 area of research related to tobacco industry
11 advertising spending in magazines. The company has
12 also functioned on a pro bono basis in advising -- in
13 advising the CDC on similar issues.

14 Q. In any other programs?

15 A. None that I recall.

16 Q. Does Initiative Media review any of the
17 advertisements provided to it under the Prop 99
18 campaign before they are aired?

19 A. No.

20 Q. For the current advertisements that are
21 running, do you know whether or not any of them deal
22 with environmental tobacco smoke versus any other
23 topic?

24 A. No.

25 Q. Can you explain to me what Initiative
26 Media's recordkeeping program is with respect to the
27 media spots that it purchases for the Prop 99
28 campaign?

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1 A. The recordkeeping would be copies of --
2 they would likely be copies of the buying parameters
3 that come from the advertising agency. Those are
4 usually transmitted in writing. Sometimes they are
5 over the phone. They are written down by an account
6 executive. I would sort of hope that they were in
7 writing. A lot of money is involved.

8 The -- what we call buy sheets, which are
9 after the buy is placed, after the buy is made, it has
10 the entire schedule in a given market. For example,
11 Los Angeles, it would say that we had bought, you
12 know, KCBS, KNBC, KABC, KCAL. And it would say how
13 many rating points we bought on those stations or how
14 those rating points were distributed in terms of early
15 morning, prime time, daytime, kid time, whatever.

16 And then finally there could be the bills,
17 invoice, copies of the invoice that we prepare that
18 actually go to the advertising agency which include
19 documentation as to the advertising actually running
20 in the form of an invoice matching report. Which we
21 take the invoice from the station that shows precisely
22 where each spot ran and how much it cost. And we
23 compare that to that which was ordered so that we can
24 clear any discrepancies and that provides
25 documentation that the client got what they paid for.
26 But literally what is on it is, here is -- in essence
27 you boil it down, here is an advertising unit, ordered
28 and bought. Here is an advertising unit, ordered and

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1 bought. And a bottom line price for that schedule,
2 and the schedule might have been \$600,000.

3 So we would have about, I would guess,
4 eight to nine years' worth -- we keep records for
5 seven years. So we have, I'm sure, I have never seen
6 them, but I guess there are many, many hundreds of
7 boxes of records related to this.

8 Q. Am I correct that given enough time one
9 could pick a particular advertisement created by Asher
10 and go through the documents maintained by Initiative
11 Media and identify every television station, date and
12 time where that particular commercial ran?

13 MR. PHILLIPS: I think you are going to need to

14 establish some foundation for that question. I am not
15 certain myself whether Mr. Silverman is knowledgeable
16 as to the manner in which all of those records are
17 maintained and by that I mean, whether they are
18 categorized by ad agency, by subject matter, by
19 station, by what.

20 MR. KAPLAN: Okay. Let me get the concrete
21 example.

22 Q. Prior to the advertisement -- strike that.
23 Let me back up farther than that. You just gave a
24 description of the process of record-keeping. Is that
25 the same process which Initiative Media uses on the
26 Prop 10 campaign?

27 A. Yes.

28 Q. And that's the same process which

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1 Initiative Media uses on the Oregon campaign?

2 A. Yes.

3 Q. Let's talk about the Nicotine Sound Bites
4 commercial.

5 A. Okay.

6 Q. Did Initiative Media buy time for the
7 running of the Nicotine Sound Bites commercial?

8 A. We bought a schedule which the Nicotine
9 Sound Bites commercial would have run.

10 Q. Do you know whether or not the Nicotine
11 Sound Bites commercial did in fact ever run in the
12 schedule you purchased?

13 A. I know it as a consumer, having seen it on
14 television at that time, but I --

15 Q. I don't understand your answer. When you
16 say you know it as a consumer --

17 A. I saw the commercial on television. The
18 only way it could have appeared on television is if
19 somebody paid for the time. The only people buying
20 time at that time was Western International Media, so
21 I can presume and assume that it ran and that somehow
22 was connected to the media buy that Western made.
23 Western would not have made a buy for a specific
24 commercial. It's not how you buy. You don't say I am
25 going to buy time for that specific commercial. You
26 buy a bunch of rating points from a station.

27 Q. Let me get fairly basic with you. What is
28 a rating point?

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1 A. Okay. A rating point represents -- each
2 point represents one percent of the audience watching
3 television at any given time. When you buy media --
4 when you buy broadcast media, television, radio,
5 typically in major markets you buy based operating
6 points. It's simply -- it's the industry way of
7 creating an apples to apples comparison when you are
8 buying time.

9 You set a goal and you say, I want to buy
10 X number of rating points. A hundred rating points,
11 75 rating points, 150 rating points in a given week.
12 I want those rating points distributed by day part and
13 there are very specific day parts in television, radio
14 media.

15 Each of those rating points in essence --
16 rating points have different values according to the
17 total audience watching a given show. So if you run a
18 commercial in ER, you are accumulating X number of

19 rating points and if you run a commercial in the Three
20 Stooges, you are getting far fewer rating points.
21 We deal in something called target rating
22 points. Target rating points is a percentage of the
23 very specific target audience you are trying to reach
24 as identified in -- media targets identify principally
25 demographically, but adding to that certain lifestyle
26 and purchase behavior factors.

27 You create a target rating point so that
28 ER may have an overall rating -- which you hear about

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1 a Nielsen rating of 17, but in terms of a given
2 target, that might be -- they might have actually a
3 greater or smaller percentage of that target.

4 But you order based on operating points.
5 And you measure based on operating points.

6 There is another part of the process which
7 we don't do in this particular case which is called
8 trafficking. Trafficking is instructing the station
9 what commercials to run within the rating point that
10 have been bought for them. As you have seen actually
11 in one of these reports that we looked at earlier,
12 there were -- there was a rotation report which said
13 that 25 percent of the commercials of the rating
14 points were being used to run commercial X, another
15 percentage was being used to run commercial Y.

16 That's not something that we do on this
17 account, on these accounts, let me put it like that,
18 simply because of the way this works with the
19 advertising agencies that are involved.

20 When we receive bills from stations,
21 even at that point we don't know what is run. If we
22 were to go to the stations to look at their logs, we
23 don't have copies of it, we don't do that, but we
24 could go to the stations, the station logs would
25 indeed show which specific commercial numbers ran in
26 different places.

27 Q. If you are buying --

28 MR. PHILLIPS: Excuse me. The ad agencies,

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1 would they know -- would they have results of
2 trafficking as well or just the --

3 THE WITNESS: They are the one that gets the
4 instructions for trafficking. If nothing else, they
5 would have the -- they would have what they asked for.
6 They wouldn't necessarily have proof of performance
7 either.

8 BY MR. KAPLAN:

9 Q. You actually anticipated my next question.
10 If you don't give the trafficking instructions, where
11 does the radio station get the trafficking
12 instructions from on the tobacco accounts?

13 A. They get them on the -- on the tobacco
14 accounts they get them from the advertising agency.

15 MR. KAPLAN: We have been going a little bit
16 over an hour. Why don't we take a break.

17 MR. PHILLIPS: Sure.

18 (Recess taken.)

19 BY MR. KAPLAN:

20 Q. Before we went off the record, we were
21 talking about the way that Initiative Media maintains
22 documents related to its purchases and you had
23 indicated that the documents which Initiative Media

24 has would indicate the general flights which were
25 purchased but not the specific traffic that went on
26 those buys. Is that correct? As it relates to the
27 tobacco campaigns.

28 A. I believe that to be correct.

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1 Q. And you also believe that if we would want
2 to determine what commercials played during any
3 particular television program or radio program, we
4 would need to get that information from Asher as it
5 related to the tobacco campaigns?

6 A. It would be much easier.

7 Q. Does Initiative Media have that
8 information in its files, albeit difficult to --

9 A. No. We would have to secure it from the
10 hundred stations that would have carried the
11 advertising.

12 Q. How is the information transmitted to the
13 radio or television station as to what particular spot
14 should air at a particular time on a particular
15 station?

16 A. For the tobacco stuff.

17 Q. Correct.

18 A. The traffic department at the advertising
19 agency typically sends a fax to the station. It
20 doesn't say to run a particular spot on a particular
21 program. You can't do it that way. They just don't
22 allow that in local advertising.

23 What you do is you say I have got a
24 certain percentage of the schedule that is running in
25 certain day parts and then they instruct them on how
26 to rotate the commercials in those day parts. 20
27 percent of the spots that are running in early morning
28 should be 20 percent commercial X, 20 percent

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1 commercial Y, 20 percent commercial Z, et cetera.

2 Q. To your knowledge were any of the
3 commercials which Asher designed either when you were
4 there or after that targeted to a specific market?

5 A. Do you mean geographic market?

6 Q. No. It was a poor question. When you
7 were working at Asher, did Asher create any markets,
8 any -- start it one more time. When you were working
9 at Asher, did Asher create any tobacco spots which
10 were targeted toward children under the age of 18 or
11 usage under the age of 18?

12 A. Yes.

13 Q. Do you remember the name of any such spot?

14 A. Yes.

15 Q. Am I correct that Asher would have wanted
16 such spot to have run in some form of media that is
17 watched or listened to dominantly by youth under the
18 age of 18?

19 A. Yes.

20 Q. How is media purchased to run such a spot?

21 A. The buy specs that we would be given or
22 any media operation would be given would say that we
23 need X amount of time. The target audience that we
24 want to reach discretely, let's say is 15 to 18 male,
25 and so the parameters would be to buy rating points or
26 spots in media vehicles in radio or television
27 programming or stations that predominantly reach that
28 demographic. It's much easier to do in radio, because

1 radio slices and dices much more discretely than
2 television does.

3 In television, you have to specify -- you
4 to have to specify programming to get there. But --
5 so you might say, well -- or you are buying certain
6 kinds of networks, like MTV or buying wrestling, be it
7 on UPN or be it on TNT or be it on whatever.

8 (At this point HENRY LERNER, ESQ.
9 entered the deposition proceedings.)

10 BY MR. KAPLAN:

11 Q. So if Asher has a commercial which they
12 have found to be most effective at youth between the
13 ages of 15 and 18 and they wanted to place that
14 commercial in television, would they have picked
15 specific shows they want it to air on?

16 A. What they would do is give us guidelines
17 as to the kind of programming they would want it to be
18 on, but you don't have to give specific programs,
19 because if you say we want you to buy to this demo, to
20 this demographic, then the programs become clear that
21 we need to be buying in.

22 Q. In that circumstance how does Asher
23 communicate to the station which advertisement should
24 run?

25 A. In that -- in those specific day parts?
26 They send them a fax and they give them instructions
27 with a commercial code on it. Every commercial that
28 is produced has a commercial code and a title.

1 Q. So in other words, Asher would send a fax
2 to a particular television station saying all
3 commercials -- all of our commercials which run in
4 this demographic should run commercial X.

5 A. In rotation. It's very rare you ever run
6 one spot exclusively. It would be a rotation of
7 certain commercials that are deemed appropriate for
8 that target audience.

9 Q. Because we have agreed to break at 3:30,
10 let me do some stuff that's a little bit out of order
11 of what I would otherwise do.

12 Let me have some documents marked and
13 then have you identify them as to what they are.
14 These are documents which were provided to me at the
15 beginning of the deposition by your attorney.

16 Let me start off with this document and
17 we will have it marked as Exhibit 4309.

18 (Deposition Exhibit 4309 was marked
19 for identification.)

20 MR. KAPLAN: Let's mark this 4310.

21 (Deposition Exhibit 4310 was marked
22 for identification.)

23 MR. KAPLAN: And this one will be 4311.

24 (Deposition Exhibit 4311 was marked
25 for identification.)

26 BY MR. KAPLAN:

27 Q. Let me hand you what has been identified
28 as Exhibit 4309. Can you take a moment and look at

1 that document and tell me what it is.

2 A. This is a monograph titled "Fighting Smoke
3 With Fire," subhead how to create tobacco use
4 prevention advertising campaigns that work, that I

5 wrote as an individual functioning as a consultant to
6 the Brain Institute of the University of Florida which
7 hired me to write this.

8 Q. When did you author Exhibit 4309?

9 A. I would guess in early 1998. Is there a
10 date? Well, thank you. Yes. Early 1998. Pretty
11 good.

12 Q. To your knowledge was Exhibit 4309 ever
13 published?

14 A. I don't know.

15 Q. What was the nature of the work you were
16 performing for the Brain Institute of the University
17 of Florida?

18 A. The university was preparing a bid to
19 perform certain services for the State of Florida with
20 monies derived from the settlement agreement with the
21 State of Florida that had been entered into by the
22 tobacco industry and they asked me to write a paper on
23 them on what I thought worked or didn't work in this
24 particular arena.

25 Q. You indicated earlier in this deposition
26 you had provided information which you understand was
27 used in a bid in the State of Florida for a media
28 campaign. Was this part of that information?

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1 A. No. This was totally separate.

2 Q. Do you have an understanding as to whether
3 or not the Brain Institute of the University of
4 Florida did in fact get any money as a result of the
5 settlement?

6 A. I don't know.

7 Q. When were you contacted by the Brain
8 Institute?

9 A. I am not certain. It was most assuredly
10 before March of 1998. But I would -- I would chance a
11 guess that it was in the latter part of 1997, because
12 we were working with them on an unrelated matter.

13 Q. When you say we were working, you mean
14 Initiative Media?

15 A. No. Me as an independent consultant.

16 Q. Do you intend to submit 4309 for
17 publication?

18 A. No.

19 Q. Can you turn your attention, please, to
20 the document marked 4310. Can you tell me what this
21 document is.

22 A. It's headlined "Draft Preliminary
23 Injunction Order JCCP4042 Proposition 65 Environmental
24 Tobacco Smoke Cases."

25 Q. What do you understand this document to
26 be?

27 A. This document was provided to me when I
28 was contacted regarding my work as an expert witness

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1 or my prospective work as an expert witness for this
2 Prop 65 case.

3 Q. What did you do with this document once
4 you got it?

5 A. I read it.

6 Q. Anything else?

7 A. I tried to understand what the case was
8 about and what possible use it might be.

9 Q. Can you turn your attention to Exhibit

10 4311.
11 A. Yes.
12 Q. Can you tell me what this document is.
13 A. This is a document called "Warning
14 Californians About the Dangers of Environmental
15 Tobacco Smoke: The Status of ETS Exposure Prevention
16 in the State." It was prepared by a division of the
17 University of Southern California.
18 Q. How did you come to be in possession of
19 this document?
20 A. I believe that this document was given to
21 me by the attorneys that originally contacted me
22 regarding functioning as an expert witness.
23 Q. Did you review this document?
24 A. At that time? Yes.
25 Q. Have you used any of the information
26 contained in this document in your general work as an
27 employee of Initiative Media?
28 A. Not really, no. Not outside the specific
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1 situation of functioning as an expert witness.
2 MR. KAPLAN: Let me have this document marked
3 as Exhibit 4312.
4 (Deposition Exhibit 4312 was marked
5 for identification.)
6 BY MR. KAPLAN:
7 Q. Mr. Silverman, can you please review the
8 document that I have just handed you that's identified
9 as Exhibit 4312 and tell me what this is.
10 A. This is a recap of fourth quarter 1998
11 billing related to the ballot measure called
12 Proposition 10 which lists the estimates for the
13 months of October-November when the advertising
14 activity took place on television and on cable
15 television which are billed separately for various
16 reasons, technical reasons, showing the estimate
17 number and the amount -- the gross cost of the media
18 associated with that.
19 Q. And this relates to the work which Western
20 Initiative did related to the passage of Prop 10?
21 A. That's correct.
22 Q. As opposed to the work it's doing for the
23 California Children and Families Commission. Correct?
24 A. Correct.
25 Q. You had indicated that the work which
26 Initiative Media performed on the Prop 10 campaign was
27 done pro bono?
28 A. Meaning we did not charge a fee. We --
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1 the television stations or the radio stations and
2 cable operators, whatever, were paid for their time,
3 but we didn't charge a fee.
4 Q. Whose decision was it not to charge a fee
5 for the work done on Prop 10 campaign?
6 A. My then boss, the president of the
7 company.
8 Q. Who --
9 A. His name was Michael Kassen. It was
10 unrelated to the subject of the campaign.
11 Q. What was the reason why the work was done
12 pro bono?
13 A. He's a very good friend of --
14 Q. Rob Reiner?

15 A. Rob Reiner.
16 Q. Can you explain to me what information is
17 contained in each of the columns on Exhibit 4312?
18 A. Column 1, this is classified as a
19 political campaign in the way we operate. It's just
20 classified that way. It is -- product could be
21 political, it could be general media, it could be
22 direct response media. They are classified
23 differently for us to keep track of it.
24 Column 2 is the estimate number. The
25 estimate is actually the document we provide to the
26 client to show them that -- show them the -- what we
27 anticipate the cost of media to be. An estimate can
28 only be higher than actual cost of the media, it can't
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1 be lower, because after the advertising schedule is
2 completed, we have to go back to determine what ran,
3 what didn't run or what ran incorrectly, ran outside
4 of parameters for which we won't pay. So this is the
5 going-in estimate.
6 And there would be -- there was one
7 estimate for television for October, one for November.
8 One for cable, October one for cable for November.
9 Literally that was the total cost of the advertising
10 schedule. For example, for the very first line, it
11 would have been October '98 television. That would
12 be -- total expenditure was \$1,465,830 was the gross
13 cost of media.
14 There is a recap in support of this. It
15 would be a full schedule breaking down the stations
16 that were on the buy across the state, breaking it
17 down further by when the spots appeared. So you end
18 up with every invoice for a month, you end up with
19 roughly half an inch of paper. And the gross costs --
20 in our industry media is always quoted at gross,
21 meaning there is a 15 percent allocation built in that
22 typically goes to the advertising agency. This is an
23 age old system. So that we are always comparing
24 apples to apples all media is quoted in gross, but
25 actually paid for in net. So the actual expenditure
26 would have been 85 percent of this amount.
27 Q. You had indicated that the backup data for
28 this, the breakdown, would include the station and
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1 when the spots appeared?
2 A. It would -- yes.
3 Q. Without detail, what a spot appeared, just
4 that block of time contained a commercial in the yes
5 on Prop 10 campaign. Correct?
6 A. Correct.
7 Q. What would the backup documentation look
8 like?
9 A. Station invoices -- you start with station
10 invoices, comes in from each station. The station
11 invoices show that the spot ran. It might even in
12 some cases have the commercial number, might even have
13 the commercial code. Though that's immaterial to us
14 as long as it's a commercial that we order. It would
15 show what time it ran. And it would show the rating
16 of the spot.
17 The invoice would actually also show
18 the -- the actual invoice that comes into the station
19 to us would actually also show the unit price of that

20 particular commercial. However, we do not reveal the
21 unit rates to our clients. It's part of media buying.
22 It's part of what the business is about. So that is
23 literally taken out when it's prepared as backup to be
24 provided to the client. What the client sees is a
25 gross total of what is spent on the station because
26 the rates are highly competitive. And very
27 confidential.

28 Then an invoice is prepared --

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1 Q. By your company?

2 A. By our company. That consolidates all of
3 the invoices that have been received by all the
4 television -- that we have from all of the television
5 stations and all of the radio stations or any other
6 media that's been used, all the television stations,
7 radio stations, whatever, that have been used, and a
8 given invoice may include many estimates. So an
9 invoice for -- in this case the way it happened to
10 work -- this is a very simple one, about as simple as
11 I have ever seen. We have an invoice for one month's
12 activity and a second -- an invoice for one month's
13 activity and then another invoice for a second month's
14 activity. But the invoices could get much more -- the
15 estimates could get far more complex based on the type
16 of media that is being used on the station, number of
17 markets. Clients determine how they want to get
18 billed. It's up to us to accommodate whatever they
19 want.

20 (At this point HENRY LERNER, ESQ.
21 left the deposition proceedings.)

22 BY MR. KAPLAN:

23 Q. The invoice which you provide to your
24 client, does that contain a breakdown of -- breakdown
25 by television station or radio station?

26 A. The invoice doesn't. The invoice takes it
27 to schedule. In other words, media that ran on
28 television in the month of March. In some cases it's

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1 broken down. The total amount that was spent. In
2 some cases it's broken down by market. It's rarely
3 broken down by station.

4 Q. Is there any other supporting
5 documentation other than the station invoice and the
6 invoice which your company creates?

7 A. Not in any of these cases. We have
8 certain clients that require affidavits from stations
9 to show it ran. For many years that was the standard
10 in the industry and the industry has gone away from it
11 for the most part because of electronic billing from
12 the stations to us. Where it's -- in an effort to try
13 to avoid -- try to go as paperless as possible.

14 MR. KAPLAN: I promised Ms. Frostrom we would
15 end at 3:30 so she can catch a train because I think
16 it is pretty clear we are not done yet.

17 MR. PHILLIPS: May I make a couple of quick
18 statements for the record so there is no confusion as
19 to Exhibit 4312?

20 MR. KAPLAN: Sure.

21 MR. PHILLIPS: This is a document that was
22 produced by me this morning on behalf of Initiative as
23 an exemplar of many such documents in the records of
24 Initiative relating to anti-tobacco campaigns in

25 response to a request made by Mr. Kaplan. If you will
26 recall, Mr. Kaplan made a similar statement at the
27 beginning of this deposition. The fax date and time
28 indicated on the bottom left-hand corner is the fax

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1 date and time that this was received and it was
2 received by me here in care of Mr. Kaplan.

3 At the bottom right-hand corner, the
4 reference to Page 2 is because there was a fax cover
5 sheet addressed to me from the client, which I
6 removed and I did not produce as a confidential
7 communication between attorney and client.

8 MR. MILES: When you say this document was
9 produced by you, are you saying that you made it
10 available to us or are you saying it was typed under
11 your direction?

12 MR. PHILLIPS: No. I made it available to you.
13 It was prepared by Initiative and faxed over to me in
14 Mr. Kaplan's care here this morning.

15 MR. MILES: Was it prepared for the purpose of
16 this deposition or was it a preexisting document?

17 MR. PHILLIPS: It was a preexisting document
18 and it was one of many, many of these kinds of
19 documents. The request I made of Initiative at
20 Mr. Kaplan's request is to have an example, an
21 exemplar, if you will, of what he might be able to
22 review when all of these are made available to him in
23 about a week's time.

24 MR. MILES: Thank you.

25 MR. KAPLAN: With that, sir, what we will do is
26 continue your deposition to some as of yet unpicked
27 date at the mutual convenience of as many people in
28 the room as we can accommodate after the documents are

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1 produced. There are a couple of other documents here
2 that I will attach that I premarked -- I will attach
3 them at the next day of your deposition. We don't
4 need to bother with that now.

5 With that we will set your deposition
6 for another day.

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8 (At the hour of 3:31 P.M., the
9 deposition was adjourned.)

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DECLARATION

I hereby declare I am the deponent in the within matter; that I have read the foregoing deposition and know the contents thereof, and I declare that the same is true of my knowledge except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under the penalties of perjury of the State of California that the foregoing is true and correct.

Executed this _____ day of _____, 2000,
at _____, California.

W I T N E S S

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I, JARDENE L. PLATT, RPR, CSR No. 3724 in and for the State of California, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify as to the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me at the time and place therein set forth and was taken down by me stenographically and thereafter transcribed via computer-aided transcription under my direction;

I further certify that I am neither counsel for, nor related to, any party to said action, nor interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 3rd day of August, 2000.

JARDENE L. PLATT, RPR, CSR No. 3724

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